IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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I.

OPINION BELOW

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 313 So.2d 675 (1975) (A. 149-156). The findings of fact and judgment of the Circuit Court of the Fifth Judicial District of Florida in and for Citrus County finding petitioner guilty and sentencing him to die are unreported and appear at A. 138-140.

II.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on February 26, 1975. The petitioner for certiorari was filed on May 24, 1975, and was granted on July 6, 1976.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes and Rules of Criminal Procedure of the State of Florida:

Fla. Stat. Ann. §775.082 (1975-1976 supp.).

> "Penalties for felonies and misdemeanors
>
> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death. . . ."

Fla. Stat. Ann. §782.04 (1975-1976 supp.).

> "Murder
>
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.
>
> (b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment."

Fla. Stat. Ann. §921.141 (1976-1977 supp.).[1]

> "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

[1] Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing on sentencing, a special jury may be summoned.

(1) Separate proceedings on issue of penalty.–Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable.... If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).[2] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.–After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

---

[2] The subsections setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1976-1977 supp.), however, are numbered respectively, (5) and (6).

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.–Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence.–The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after the certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority

over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.–Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.–Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

Fla. R. Crim. P. 3.710 (1975).

"Presentence Report:–In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

Fla. R. Crim. P. 3.711 (1975).

"Presentence Report: When Prepared–(a) Except as provided in subsection (b) the sentencing Court shall not authorize the commencement of the presentence investigation until there has been a finding of guilt.

(b) The sentencing Court may authorize the commencement of the presentence investigation prior to finding of guilt if:

(1) The defendant has consented to such action; and

(2) Nothing disclosed by the presentence investigation comes to the attention of the prosecution, the Court or the jury prior to an adjudication of guilt. Upon motion of the defense and prosecution the Court may examine the presentence investigation prior to the entry of a plea."

Fla. R. Crim. P. 3.712 (1975).

"Presentence Report: Disclosure—The presentence investigation shall not be a public record and shall be available only to the following persons under the following stated conditions:

(a) To the sentencing Court to assist it in determining an appropriate sentence.

(b) To persons or agencies having a legitimate professional interest in the information which it would contain.

(c) To reviewing Courts if relevant to an issue on which appeal has been taken.

(d) To the parties as Rule 3.713 provides."

Fla. R. Crim. P. 3.713 (1975).

"Presentence Investigation Disclosure: Parties—(a) The trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing. Any information so disclosed to one party shall be disclosed to the opposing party.

(b) The trial judge shall disclose all factual material, including but not limited to the defendant's education, prior occupation, prior arrests, prior convictions, military service and the like, to the defendant and the State a reasonable time prior to sentencing. If any physical or mental evaluations of the defendant have been made and are to be considered for the purpose of sentencing or release, such reports shall be disclosed to counsel for both parties.

(c) Upon motion of the defendant or the prosecutor or on its own motion, the sentencing Court may order the defendant to submit to a mental or physical examination which would be relevant to the sentencing decision. Copies of such examination or any other examination to be considered for the purpose of sentencing shall be disclosed to counsel for the parties subject to the limitation of Rule 1.713(b) [sic]."[3]

[3] There is no "Rule 1.713(b)."

After petitioner was sentenced to death on January 30, 1974, the Florida legislature enacted Fla. Laws 1974, c. 74-112, §8, effective July 1, 1974. This law, as amended by Fla. Laws 1975, c.75-49, §12, and c.75-301, §2, is now codified as Fla. Stat. Ann. §921.231 (1976-1977 supp.). Section 921.231(1) and (2) provide that presentence investigation reports are mandatory in cases where a defendant has been found guilty or has pleaded guilty to a felony and define the contents of the reports. The next two subsections provide:

"(3) All information in the presentence investigation report should be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, shall bear the burden of explaining why it was not possible to verify the challenged information.

"(4) The nonconfidential portion of the pre-sentence investigation shall constitute the basic classification and evaluation document of the Department of Offender and Rehabilitation and shall contain a recommendation to the court on the treatment program most appropriate to the diagnosed needs of the offender, based upon the offender's custody classification, rehabilitative requirements, and the utilization of treatment resources in proximity to the offender's home environment."

Although subsection four refers to a "nonconfidential portion" of the report, the statute does not elsewhere deal with the question of confidentiality in any way. To the extent that this statute conflicts with Rules 3.710-3.713, quoted *supra*, pp. 6-8, the statute may not be given effect. *See Rhynes v. State*, 312 So.2d 520, 521 (Fla. App. 1975); *Buckles v. State*, 310 So.2d 748, 749 (Fla. App. 1975); *Johnson v. State*, 308 So.2d 127, 128-129 (Fla. App. 1975).

IV.

QUESTION PRESENTED

Whether nondisclosure of a "confidential" portion of a presentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the presentence report?

V.

STATEMENT OF THE CASE

On August 23, 1973, petitioner Daniel Wilbur Gardner was indicted for the first-degree murder of his wife, Bertha Mae Gardner. (A. 3.) From January 7 through January 10, 1974, he was tried in the Circuit Court of the Fifth Judicial Circuit in and for Citrus County, Florida, under the bifurcated capital-trial procedures established by Fla. Stat. Ann. §921.141 (1976-1977 supp.), pp. 3-6 *supra*. He presented no evidence at the guilt phase of the trial (*see* A. 88-90), and the jury convicted him of first degree murder (A. 106, 129). He testified at the penalty phase, and the jury—after deliberating for twenty-five minutes (A. 126—returned an advisory verdict rejecting the death

penalty and recommending a sentence of life imprisonment (A. 126-127, 131). The trial judge ordered and considered a presentence investigation report (A. 126, 130, 138), although only portions of it were disclosed to the defense and prosecution (A. 138). On January 30, 1974, he overrode the jury's recommendation of life imprisonment and sentenced petitioner to die. (A. 138-140.) The Florida Supreme Court affirmed *per curiam* in a brief opinion from which two Justices dissented as to penalty. (A. 149-156.)

In any ordinary case before this Court, our Statement of the Case would represent the version of the facts that was credited by the trier of fact, either explicitly or by implication in its verdict. That approach is impossible here. The sole issue now before the Court relates to the procedures for determining penalty, not guilt. As to penalty, the jury voted for life, and the judge decided for death.

Under Florida's death-sentencing procedure, the jury was not required to state the facts it found. The trial judge was required to make "specific written findings of fact based upon the [aggravating and mitigating] circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141(3)(b) (1976-1977 supp.). But that requirement was ostensibly satisfied here by one factual finding relating to a single aggravating circumstance (uncontested, in any event, as a matter of historical fact), plus the conclusionary finding that "such aggravating circumstances [sic] outweighs the mitigating circumstances, to-wit: none" (A. 138; *see* A. 138-139). What the trial judge found concerning the rest of the case cannot be known.

Finally, the Florida Supreme Court's opinion affirming petitioner's death sentence adds literally nothing to

an assessment of the facts of record. That opinion consists entirely of (1) a statement that the court has jurisdiction of the appeal (¶ 1); (2) a close paraphase of the indictment (¶ 2); (3) a statement that the jury convicted the defendant as charged and recommended a life sentence, but that the trial judge "[a]fter carefully considering and weighing all the evidence presented during the trial and sentencing proceedings" (A. 149) imposed the death sentence (¶ 3); (4) a verbatim quotation of the trial judge's single factual finding, based upon the Medical Examiner's description of the victim's injuries (¶ 3); (5) a statement that the Supreme Court has carefully considered the case, "with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded" (¶ 4); and (6) the following discussion (in its entirety) as to penalty:

> "[u]pon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crime."
>
> "Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed."

(¶¶ 5-7) (A. 151.)

In this state of the record, the only way to present the facts relevant to the federal constitutional issue—that is, the significance of the trial judge's non-disclosure of a part of the presentence investigation report which he read and considered before rejecting the jury's advisory sentence—is to set forth (A) the evidence regarding the offense and the offender that was presented before the jury, and (B) the additional material received by the trial judge but not the jury.

A. The Evidence Presented Before The Jury

The killing of Bertha Mae Gardner occurred on the night of June 29-30, 1973, after Mr. and Mrs. Gardner had been drinking together at a local bar. The Gardners had been married seven years earlier when he was 33 and she was 21. (A. 17.) Mrs. Gardner's mother, Glenda Mae Demney, lived in a trailer owned by petitioner (A. 39) "[r]ight beside" (A. 27) the trailer in which the Gardners and their four children lived.

Petitioner left his trailer about 10:00 a.m. on June 29, and spent the day with friends visiting various bars and liquor stores and drinking large quantities of whiskey, beer, and vodka. (A. 109-113.) That evening, Mrs. Gardner and her mother, who had been drinking beer together (A. 29), took two of the Gardner children to the home of a relative (A. 28). Mrs. Gardner then entered the Sugar Mill Bar between 8:00 and 9:00 p.m. (A. 29.) She returned to the Demney trailer about 10:00 p.m. and announced that she was going to look for petitioner (*ibid.*) and "bring him home" (A. 30).

She again entered the Sugar Mill Bar and joined petitioner at his table where the two had "a couple" (A. 113) of drinks of whiskey together. Petitioner bought a fifth of whiskey when they left the Sugar Mill about 11:30 p.m. (*ibid.*) and they drank from it on the way home. (A. 114.) After having a nightcap with the driver who brought them home (*ibid.*), the Gardners began arguing about their four children, who were not present in the trailer (A. 115). According to the petitioner,

> "[w]hen I first asked her, I said 'who has got the children?', and she asked me wouldn't I like to know, and I said 'yes, I certainly would,' and she

> said 'well, why don't you find out,' and then I asked her, I said 'does your mother have the children,' 'have our children,' and she said 'well, why don't you go find out,' so I said 'O.K., I will.' "

(*Ibid.*)

Between 11:00 and 11:30 p.m., as Mrs. Gardner's mother and a "male friend," Mr. Alva "Buckshot" Loenecker, were drinking whiskey and beer together, petitioner suddenly tore the door off her trailer,[4] rushed in, and, without saying anything, struck Mrs. Demney on the side of the head, knocking her unconscious. (A. 30.) He appeared to her to have been drinking but not to be "drunk." (A. 32.) "Buckshot," who testified that petitioner was "as good a friend as I ever had," then "asked him not to do that no more." (A. 38.) Petitioner responded that "he was going back and beat hell out of his wife and I ["Buckshot"] said 'please don't do that Bill.' " (*Ibid.*). "Buckshot" testified that he did not see petitioner beat his wife (A. 39), but:

> "I seen her [Mrs. Gardner], she was at the door at the [Gardner] trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more,' it could have been her that said it, now, or could have been the T.V. was playing loud."

(*Ibid.*)

Petitioner returned briefly to the Demney trailer about a half hour later and appeared to "Buckshot" to

[4] Mrs. Demney testified that petitioner "broke down the door" "hinges and all." (A. 30.) "Buckshot" stated that petitioner "[j]ust jerked the door down and come in." (A.42.)

want "to jump on Glenda Mae" Demney again. (*Ibid.*) "Buckshot" told him " 'Bill you done wrong [to hit Mrs. Demney],' and he said 'yeah, I believe I have.' " (*Ibid.*) Petitioner then returned to his trailer.

During the night, petitioner's half-brother, who lived in a house 150 feet away from petitioner's trailer (A. 46), heard petitioner talking (although not loudly) (A. 48). Petitioner's aunt, who lived less than half a block away from petitioner, was awakened at about 11:30 p.m. by "some bumping, moving furniture" in petitioner's trailer. (A. 49.)

At about 7:00 a.m. the next morning, June 30, petitioner reappeared at his mother-in-law's trailer. According to Mrs. Demney, he told her "to come over and check on my [Mrs. Demney's] daughter, said my G.D. [d]aughter, said she wasn't breathing right."[5] (A. 31.) Mrs. Demney proceeded to the Gardner trailer and found her daughter's body lying on the bed, naked and covered with bruises. Mrs. Demney stated that petitioner "wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her,' and I just touched her and told him he had better call an ambulance." (A. 31-32.) Petitioner said nothing, and just "kept mumbling from the front door to the bed room." (A. 32.) When "Buckshot" entered the trailer a few minutes later, he saw petitioner holding the body of his wife:

> "I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I

[5] "Buckshot," who had spent the night in the Demney trailer, testified that petitioner came to that trailer about 7:00 a.m. (A. 41) "and called me, said something was wrong with his wife . . . said something has happened to my wife, that I can't get her awake, looks like she has took some dope" (A. 40).

can't understand why my wife won't wake up, looks like she's–said 'have I killed her or is she dead,' and I said 'she looks like she is dead,' and he asked me to to call the ambulance, and then I went and got his mother."

(A. 40.)

Petitioner's mother testified that she came immediately to the trailer and said to petitioner, " 'Dan, what have you done?', and he says 'I haven't done anything,' he says 'I want somebody to get some help.' " (A. 45.) She had an ambulance called, and then returned to find petitioner weeping on the couch. (*Ibid.*) He said to her " 'mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . [sic]" (*Ibid.*)

Medical tests subsequently indicated that Mrs. Gardner had died from a severe beating and attendant blood loss and internal hemorrhage. (A. 76-78.) In his "Findings of Fact" made for purposes of sentencing, the trial judge summarized the Medical Examiner's testimony concerning the injuries to Mrs. Gardner's body as follows:

"(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

(f) Bruised and swollen external genitalia.

(g) Hemorrhage in and around the right adrenal gland and right kidney.

(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

(j) A large laceration or tear of the entire right side of the liver.

(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on."

(A. 139.) The autopsy also revealed that at the time of her death, Mrs. Gardner's blood alcohol content was ".19 grams percent" (A. 83) indicating a state of inebriation which was almost twice the level defined as "legal" intoxication (A. 83-84).

The police were summoned, and petitioner was arrested. Shortly before he was placed in the patrol car, he said to his half-brother, " 'Dave, I guess I really did it this time.' " (A. 48.) On the way to the station, petitioner declared to the police officers " 'why would a man do something like that,'–'why did I do something like that,' and . . . [a deputy sheriff] said 'why did you'?" (A. 69.) Petitioner replied that "his wife had been running around with other prople, and said she had been out with his brother, and he said 'that thing has been eating on me,' he said 'it was just more than I could stand.' " (*Ibid.*)

After the jury convicted petitioner of first-degree murder (A. 106, 129), the State introduced two photographs of Mrs. Gardner's badly beaten body (A. 107-108) and then rested without presenting further evidence (A. 108). The State made no sentencing recommendation and waived its right to "present argument for . . . sentence of death," Fla. Stat. Ann. §921.141(1) (1976-1977 supp.). (A. 121.)

In mitigation, petitioner testified that to celebrate a new job which would begin on Monday, July 1, he went on a drinking spree on Saturday, June 29. (A. 112.) During that Saturday, he ate no food but had two shots of whiskey and five beers in the morning. (A. 109-110.) He drank three shots of vodka around noon (A. 110), spent the early afternoon drinking whiskey in the Sugar Mill Bar (A. 111), drank more beer, and then went to another tavern (My Brother's Place) where he drank until after dark (*ibid.*). Subsequently, he returned to the Sugar Mill where he drank two or three additional whiskeys. (A. 112.) He met his wife (who appeared to him also to have been drinking (A. 113)) at the Sugar Mill at about 10:45 or 11:00 p.m. (A. 112-113.) They drank together amicably for awhile and left the bar at about 11:30 p.m., drinking whiskey on the way home. (A. 114.)

Petitioner recalled having an argument with his wife when he discovered that their children were absent. (A. 114-115.) He wanted to know where the children were, and she refused to tell him. (*Ibid.*) He also recalled that he went to his mother-in-law's trailer to look for the children, and that his wife, who had taken off all her clothes, joined him there a little later. (A. 115.) He attempted to take his wife home and "had her by the arm" as she was "fussing with . . . [him]." (A. 116.) His

wife stumbled and fell "more than once" and was "wounded" as a result of these falls. (A. 117.) Petitioner went back to the Demney trailer and had "Mr. Buckshot" come and help him get Mrs. Gardner into the Gardner trailer. (*Ibid.*) When the two men got her back to the trailer, petitioner put her into the bath tub to try and clean her up. (A. 117, 120.) Mrs. Gardner attempted to continue their argument, and petitioner tried to stop it. (A. 117.) He remembered striking his wife on her body with the back of his hand (A. 118), but did not recall ever beating her that night (A. 117).

The jury deliberated for twenty-five minutes (A. 126) and returned an advisory sentencing verdict finding that "the [m]itigating circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon the defendant by the court" (A. 126-127, *see also* A. 131).

B. Additional Material Before The Sentencing Judge

On January 10, 1974, immediately after the jury had retired to consider its advisory sentencing verdict, the trial judge ordered "a pre-sentence investigation of this defendant." (A. 126.)[6] Eighteen days later, on January

[6]Prior to trial, the trial judge had ordered a psychiatric examination of petitioner by Drs. George W. Barnard and Frank Carrera. Their reports were filed, respectively, on January 9 and January 11, 1974, and appear in full at A. 8-19.

Both reports relate petitioner's version of the events surrounding his wife's death (A. 8-9, 12-15) consistently with his trial testimony (pp. 19-20 *supra*), with one possible exception and one addition. (1) Petitioner told the doctors that he had had

(continued)

28, 1974, the presentence investigation report was completed and submitted to the court. (A. 137.) In his

(footnote continued from preceding page)

breakfast with his wife and children sometime after arising at 7:00 a.m. on June 19, 1973, and apparently well before 10:00 a.m. (A. 8, 12.) At trial, he testified that he had had coffee when he got up but told his wife that he did not want breakfast. (A. 108-109.) His narrative of the day's events was interrupted at this point; then, after he described a full day of drinking, he was asked whether "[i]t was late in the evening and you still hadn't had anything to eat all day," and he answered: "To the best of my knowledge, it seems like it was dark. We hadn't had anything to eat." (A. 112.) (2) Petitioner told the doctors that, after he removed his wife from the tub where he had bathed her, "[t]he next memory he has is being in the bed with his wife. He remembered slapping her with the back of his hand on her crotch because it seemed like 'something was there . . . looked like something with a lot of hair . . . one foot in diameter . . . reddish tint to it . . . same color as my wife's hair . . . I didn't think it was part of her.' " (A. 15, ellipsis in original; *see also* A. 8.) There is no detailed description of this matter in petitioner's trial testimony.

The two psychiatric reports contain descriptions of petitioner's prior criminal record (A. 9, 15-16) which are basically the same as that found in the disclosed portion of the presentence investigation report (note 8 *infra*), except for minor discrepancies in arrest dates and the technical labels of arrest charges, and except that petitioner additionally reported to the doctors (1) two motor vehicle violations in the early 1950's (A. 9, 15), and (2) a pickup for investigation and subsequent release in 1953 when petitioner "was investigated with a girl who was connected with drugs" (A. 9; *see also* A. 15).

Both psychiatric reports note (1) the death of petitioner's father shortly before he was born, (2) his mother's remarriage when he was six months old, (3) the separation of his mother from her second husband when petitioner was twelve, (4) petitioner's consequent commitment to a boy's home in Jacksonville between the ages of twelve and fifteen, (5) his quitting of school at age fifteen, (6) a four year stint in the Air Force with an honorable discharge, (7) work as a commercial

(continued)

January 30, 1974 "Findings of Fact," the trial judge recited that the State and petitioner's counsel had both

(footnote continued from preceding page)

fisherman and carpenter thereafter, and (8) a first marriage of seven years' duration prior to his second marriage to Bertha Mae Gardner. (A. 9-10, 16-17.)

Both reports also note petitioner's alcoholism:

> ". . . He has had visual hallucinations one night after drinking heavily and he thought he saw a snake in moss. . . . He has used marijuana several times, but no other illegal drugs. He began the use of alcohol at age 16 and drank heavily every weekend since 1956. He has had the shakes quite a bit but no DT's other than the visual hallucination mentioned above. During the past year, at times he will go 2-3 days drunk. He has had no treatment for his alcohol excess. His sister died of alcoholic cirrhosis of the liver. His father was a heavy drinker, and his half-brother a heavy drinker."

Report of Dr. George W. Barnard (A. 10).

> "[Petitioner] started drinking alcohol when he was 16 years old and began to drink regularly and heavily every weekend from a six-pack to a case of beer. In 1956 after his discharge from the service he began to drink heavier and for 1 year drank daily either whiskey, beer or wine. His drinking in the last 4 years has been that he gets drunk each time he went out on beer and whiskey. The frequency of this was usually every weekend. He denied having delirium tremens but thinks he has had the alcoholic shakes many times. Beginning in the past year he said that his drinking increased and that he would drink it if were there whether he really wanted it or not. He started going on 2 to 3 day drunks which were interrupted by 1 to 2 day dry spells. He would usually drink with friends while they rode around in cars. He felt that his drinking had affected his memory in the past 4 years. He reported that his sister was alcoholic, that his natural father was a heavy drinker and that his youngest half-brother was also a heavy drinker. He has never had Antabuse treatment for his alcoholism."

Report of Dr. Frank Carrera (A. 18).

received "that portion . . . [of the presentence investigation report] to which they are entitled." (A. 138.)[7] The undisclosed portion of the presentence investigation report was not made a part of the record, and the trial judge neither summarized it, disclosed the factual material in it, described it in any way, nor stated any reasons for its non-disclosure. So much of the PSI as petitioner's counsel received was a three page document (A. 133-137) divided into the five sections: (I)

[7] A transcript of the proceedings in open court on January 30, 1974, which was not before the Florida Supreme Court and is not a part of the record before this Court, contains the following remarks:

> "THE COURT: The motion [for a new trial] is denied.
>
> "THE COURT: At this time the Court is filing a findings of [sic] fact in the court file as required by section 921.141 of the Florida Statute, also furnishing the defendant's attorney and the state a copy of the findings of the fact. Has the State and the defendant's attorney each received a copy of that portion of the presentence investigative report to which they are entitled?
>
> "MR. GREEN: The State has, your Honor.
>
> "MR. KOVACH: Defense has, your Honor.
>
> "THE COURT: As reflected by the findings of fact filed in the court file, the Court finds that the aggravating circumstances outweigh the [m]itigating circumstances as reflected by this finding of fact. Does the defendant have anything to say at this time as to why sentence of law should not now be imposed?
>
> "MR. KOVACH: Your Honor, the defendant has previously made its plea for mercy to the Court as having the advisory finding by the jury in this matter, and would again beg the court to grant mercy to the defendant.
>
> "THE COURT: It is the judgment of this Court that the defendant be electrocuted until death in the manner directed by the laws of the State of Florida. The Court hereby appoints the public defender's office to effect an appeal of this proceedings within sixty days to the Florida Supreme Court, as required by law. . . ."

Offense–Information Resume (A. 133); (II) Prior Arrests and Convictions (A. 135);[8] (III) Personal History (ibid.); (IV) Court Officials [sic] Statements (A. 136); and (V) Plan (A. 137). In the "Court Officials Statements" section, State Attorney Trewick Green was quoted as saying that petitioner "had a fair trial and he [Green] will rely on the information revealed by the PSI." (A. 136.) This section also contained the statement that:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count [sic] about this subject."

(A. 137.)

On January 30, 1974, the trial judge entered the following "Findings of Fact" (in their entirety), and thereupon overruled the jury's recommendation of mercy by sentencing petitioner Gardner to death by electrocution (A. 140):

[8] This section indicated that petitioner had been arrested on a number of occasions but had never been convicted of a felony. The following arrests, spanning a period of twenty years, were noted: "disorderly conduct and fighting" ($25.00 fine); "vagrancy" (dismissed); "malice mischief" (no disposition shown); "disorderly conduct (drunk)" ($10.00 fine); "drunk" ($15.00 fine); "investigation of aggravated assault" (released); "assault WITC murder" (*nolle prosequi* entered); "worthless check ($25.00)" (restitution and court cost); "disorderly conduct" ($30.00 fine); "assault and battery" (dismissed); "assault and battery" (dismissed). (A. 135.)

"THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, after (1) the conviction of the defendant, Daniel Wilbur Gardner, of Murder in the First Degree, by a duly impaneled jury and his adjudication of guilt of such offense, (2) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of a life sentence, (3) the receipt of a pre-sentence investigative report on said defendant by the undersigned and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstances, to-wit: none, and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

"1. [[9]] That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

[The "Findings of Fact" here set forth the eleven subparagraphs numbered (a) through (k)

[9] *Sic*. There is no "2."

which are reproduced at pages 17-18 *supra*, detailing the injuries to Mrs. Gardner's body described by the Medical Examiner.]

and based thereon concludes that the death sentence should be imposed upon said defendant.

Dated this 30th day of January, 1974.

[signed] JOHN W. BOOTH
Circuit Judge"

(A. 138-139.)

On February 26, 1975, the Supreme Court of Florida affirmed petitioner's conviction and death sentence in the six-paragraph *per curiam* opinion that is described (and whose entire discussion of sentencing "review" is quoted in full) at pages 11-12 *supra*. *Gardner v. State*, 313 So.2d 675 (Fla. 1975) (A. 149-156). Mr. Justice Ervin, joined by Mr. Justice Boyd, dissented from affirmance of the sentence upon several grounds, including the unfitness of the death penalty for "a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide," *id.* at 679 (A. 155), and the "fundamental error" of sentencing petitioner to die after "a 'confidential' portion of the PSI report [was] made available to the trial judge *which was not provided to either* [petitioner or the prosecution]," *id.* at 678 (A. 154) (emphasis in original).

VI.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's Assignment of Error No. 12 in the Florida Supreme Court contended that "[t]he [trial]

court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3)" (A. 148); his Assignment of Error No. 13 contended that "[t]he court erred in considering the presentence investigation of defendant" (*ibid.*); and his Assignment of Error No. 18 contended that "[t]he court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravene the . . . United States Constitutio[n] by depriving defendant of due process . . . in authorizing the death sentence of defendant" (Record on Appeal at 4 [Supplement to Transcript of Record], *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106). Petitioner's briefs in the Florida Supreme Court argued the non-disclosure claim as follows:

> "The court's express consideration of the p.s.i. report . . . was patently prejudicial to appellant [because it contained allegations not based on the trial record, including a number of prior arrests] . . . . What other recommendations, allegations, statements of opinion, etc. were contained in the confidential portion of the p.s.i. report is a matter of conjecture since the court apparently did not provide either the state or appellant (or the record) with the confidential portion. (R. 49) It should be noted that the jury, without the benefit of the p.s.i. report, recommended mercy while the court, after reading and considering the report, ordered death."

Brief of the Appellant in *Daniel Wilbur Gardner v. Florida*, Fla. Sup. Ct. No. 45106, at 13-14.

> "THE IMPOSITION OF THE DEATH SENTENCE . . . CONTRAVENES THE UNITED STATES . . . CONSTITUTIO[N].* [footnote]*
>
> . . . 'The Court erred in sentencing defendant to death . . . by depriving defendant of due process . . .' [end of footnote] . . . . [T]he trial judge arbitrarily exercised . . . [his] discretion by considering the p.s.i. report. . . ."

Id. at 37-38.

> "The state ignores the court's express consideration of a report containing the opinion of police officers even though there is no legal basis for consideration of police opinion as an aggravating circumstance. More importantly, the state glosses over the court's apparent weighing of the report. The confidential portion of the report is not in the record, and neither appellant nor his counsel can examine that portion of the report. More importantly, this court cannot review significant material relied upon by the sentencing judge."

Reply Brief of the Appellant in *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106, at 1-2 (footnotes omitted).

> "The [Florida capital punishment] statute does not provide that the court is to base its determination upon matters contained in a p.s.i. report, much less the confidential portion of a p.s.i. report never subject to review by this court."

Id. at 5.

The Florida Supreme Court tacitly rejected this claim when it affirmed petitioner's conviction and sentence in an opinion which discusses no specific issues but recites that "[w]e have . . . examined and considered the record in light of the assignments of error and briefs filed . . . , with the result that we find no reversible error is made to appear. . . ." *Gardner v. State*, 313 So.2d 675, 676-677 (Fla. 1975) (A. 151). Dissenting from this opinion, Mr. Justice Ervin and Mr. Justice Boyd found error in the non-disclosure to petitioner of the "confidential portion" of the PSI:

> "[w]hat evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Id. at 678 (A. 154).

VII.

SUMMARY OF ARGUMENT

In a capital sentencing proceeding where the trial judge has ultimate responsibility for pronouncing sentence, a sentencing judge's failure to disclose to defense counsel a portion of a presentence investigative report violates the Due Process Clause of the Fourteenth Amendment and denies a convicted capital defendant the effective assistance of counsel guaranteed by the Sixth Amendment. Where the jury has rendered an advisory sentence of life imprisonment without having seen the presentence report, defense counsel must be able to correct, rebut, or supplement information in the presentence report which might influence the judge to override the jury's sentencing recommendation. In a death case, the Due Process Clause guarantees a defendant the right to fundamentally fair sentencing proceedings where he is afforded adequate notice of the critical facts and issues which will be relevant to sentence and the assistance of counsel in adversarial fact-finding procedures which will

determine whether he lives or dies. Any other rule provides inadequate protection against the imposition of death sentences upon the basis of materially untrue information or less than a full and fair consideration of mitigating (as well as aggravating) factors. Since the trial judge here did not state reasons for his failure to disclose, this case does not present the question whether non-disclosure might be constitutionally justified in particularized situations.

Although there was no contemporaneous objection to the trial judge's failure to disclose a portion of the presentence report, the issue of the federal constitutionality of this non-disclosure was adequately raised in petitioner's Assignments of Error and appellate briefs, and two dissenting Justices in the Florida Supreme Court found it to be "fundamental" and reversible error. Since the practice of the Florida Supreme Court in reviewing death cases for error is to scrutinize the record independently and fully, this Court should review the question despite the fact that the Florida Supreme Court did not explicitly consider this issue (or any other specific issue) in its *per curiam* opinion affirming petitioner's death sentence.

VIII.

ARGUMENT

A. Petitioner's Death Sentence was Imposed and Affirmed in Proceedings that Denied Him a Fair Hearing and the Effective Assistance of Counsel on the Issue of Penalty.

This case presents an extremely narrow question. On the basis of evidence received in open court, the same

jury which convicted petitioner of first-degree murder recommended a sentence of life imprisonment. The presiding judge rejected that recommendation and sentenced petitioner to death "after . . . the receipt of a pre-sentence investigative report." (A. 138.) He did not assert or disclaim reliance upon any particular portion of the report, but recited that his choice of the death penalty had been made "after carefully considering the weighing the evidence presented during [the] . . . trial and sentencing proceeding [and hence available to the jury] . . . and reviewing the factual information contained in said pre-sentence investigation." (*Ibid.*) However:

(1) The judge did not disclose a portion of the presentence investigation report to petitioner or petitioner's trial counsel.

(2) He did not summarize in open court or anywhere in the record the contents or nature of the undisclosed portion of the report.

(3) He did not state reasons for failing to disclose or to summarize it.

(4) He did not state that there *were* particularized reasons, founded upon the record in this case or upon the undisclosed material itself, for failing to disclose or to summarize it.

(5) He did not preserve a sealed copy of the undisclosed portion of the report in the record for consideration by the Florida Supreme Court, which possesses both the power to review the question of nondisclosure and a responsibility "to determine independently whether the imposition of the ultimate penalty is warranted," *Songer v. State*, 322 So.2d 481, 484 (Fla. 1975) (footnote omitted).

Consequently, the issue before this Court is whether the imposition and affirmance of petitioner's death sentence following *those* procedures can be squared with his Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to a fair hearing on the question of life or death.

Broader issues of a state criminal defendant's right to disclosure of presentence investigation materials considered in connection with noncapital sentencing need not be reached here. As Mr. Justice Stevens has noted, those issues remain unresolved at the federal constitutional level in the wake of *Williams v. New York*, 337 U.S. 241 (1949), which "did not address the . . . question whether the sentencing judge may rely upon critical information about the defendant's past without at least giving him notice of the matter relied upon."[10] Perception of the unfairness of sentencing based upon information that the defendant is given no opportunity to know, challenge, or explain, has heightened dramatically in recent years,[11] but the present case does not require the Court to decide whether that development[12] or the evolution of Sixth and Fourteenth Amendment doctrine[13] now compels the constitutional recognition of the impropriety of basing any criminal sentence upon undisclosed factual

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[10] Mr. Justice Stevens, then Circuit Judge Stevens, dissenting in part in *United States v. Fawcett*, unpublished opinion appended to the dissent from an order withdrawing hearing *en banc* as improvidently granted in *United States v. Rosciano*, 499 F.2d 173, 178 (CA7 1974). *See* pp. 63-64 *infra*.

[11] *See* pp. 49-61 *infra*; Appendices A and B *infra*.

[12] *See* note 38 *infra*.

[13] *See* pp. 39-41, 42-49 *infra*.

materials received "confidentially" by the sentencing judge. For an evolutionary development that "generally reflects simply enlightened policy rather than a constitutional imperative" may nevertheless establish "a constitutionally indispensable part of the process of inflicting the penalty of death";[14] and death is the sentence at issue here.

Nor does the present controversy require decision of the question whether, even in a death case, there may be constitutional occasions, justifications and procedures for the consideration by a sentencing judge of undisclosed presentence material. No justification for non-disclosure was advanced by the trial court below, so the issue now raised is nothing more or less than the constitutionality of unexplained, unjustified non-disclosure. Clearly, the minimal procedures necessary to support appellate consideration of the permissibility of non-disclosure in particularized situations (for example, where a need to protect a confidential informant is asserted)[15] involve, *first*, the trial judge's finding that such a situation exists,[16] and, *second*, his inclusion in the record of a sealed copy of the undisclosed sentencing information and any other undisclosed

[14] *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5275 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[15] *Cf. Roviaro v. United States*, 353 U.S. 53, 59-62 (1957); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Kerr v. United States District Court*, 48 L.Ed.2d 725, 733-734 (1976).

[16] *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). *Cf. Goldberg v. United States*, 47 L.Ed.2d 603, 616-618 (1976). *Compare Baxter v. Palmigiano*, 47 L.Ed.2d 810, 823-824 (1976).

material upon which his finding rests.[17] Since these procedures were not followed here, no need arises to consider what particularized situations might warrant non-disclosure. The sentencing judge here did not disavow reliance upon the undisclosed material; therefore, it is unnecessary to consider whether such a disavowal would suffice to insulate that material from disclosure.[18]

Our constitutional contention is simply this: at the least, the Sixth and Fourteenth Amendments forbid a judge to impose a death sentence after considering materials that he has received privately and not disavowed for sentencing purposes, unless he discloses those materials or a summary of them to the defense or makes a reviewable finding of good cause for nondisclosure and thereupon places a sealed copy of the materials in the record.

While it is not now strictly necessary to define the sort of summary that would provide an adequate substitute for full disclosure of the original materials received by the judge, the point seems clear that such a summary would have to be sufficiently detailed to give the defense an "opportunity to correct" any "misinformation," *Townsend v. Burke*, 334 U.S. 736, 741 (1948), and also to explain the significance–and to produce facts in extenuation of the apparent adverse

[17] *Cf. Campbell v. United States*, 365 U.S. 85, 92-98 (1961) (Jencks Act materials); *United States v. Seale*, 461 F.2d 345, 364-366 (CA7 1972) (electronic surveillance logs); *and see Rogers v. United States*, 422 U.S. 35, 41 (1975) (communications between court and jury).

[18] *See United States v. Picard*, 464 F.2d 215, 220 (CA1 1972); *United States v. Janiec*, 464 F.2d 126, 131-132 & n.14 (CA3 1972); *United States v. Miller*, 495 F.2d 362, 365 (CA7 1974).

significance–of even admittedly correct information, *cf. Herring v. New York*, 422 U.S. 853 (1975). Anything less would flout the principle that a capital sentencing authority "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *Jurek v. Texas*, 44 U.S.L.W. 5262, 5264-5265 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell and Mr. Justice Stevens, announcing the judgment of the Court).

This case also does not require definition of the situations constituting "good cause" (*see Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)) for non-disclosure. However, we do note that of the three particularized grounds most commonly asserted to justify the non-disclosure of presentence investigation materials–jeopardy to confidential informants, psychological trauma to the defendant, and interference with his rehabilitative disposition–the second and third grounds seem far-fetched where the sentence is death, and the first ground would be exceedingly difficult to support in the case of an indigent defendant such as petitioner who is condemned to die for killing his wife in the aftermath of an alcoholic binge. But, however this might be and whatever other satisfactory cause for non-disclosure might appear in unusual situations, surely the Sixth and Fourteenth Amendments cannot tolerate non-disclosure of death-sentencing information without *any* stated cause and under procedures that exclude from appellate consideration either the grounds for non-disclosure or the contents of the undisclosed materials.

The predicate of this contention is quickly stated. The Sixth and Fourteenth Amendments entitle a

convicted state criminal defendant to the effective assistance of counsel in sentencing proceedings. *Townsend v. Burke, supra; Mempa v. Rhay*, 389 U.S. 128 (1967). The Due Process Clause of the Fourteenth Amendment guarantees him that those proceedings must be fundamentally fair. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The effective assistance of counsel is denied not merely by counsel's outright exclusion from the courtroom but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 857 (1975). *Accord: Ferguson v. Georgia*, 365 U.S. 570 (1961); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Geders v. United States*, 47 L.Ed.2d 592 (1976). Fundamental fairness in any sort of proceeding is denied unless, " 'at a minimum [the] . . . deprivation of life, liberty or property by adjudication [is] . . . preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Goss v. Lopez*, 419 U.S. 565, 579 (1975), quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). *Accord: Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948); *In re Gault*, 387 U.S. 1, 33-34 (1967); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Wolff v. McDonnell*, 418 U.S. 539, 563-564 (1974); *and see Henderson v. Morgan*, 49 L.Ed.2d 108, 114 (1976). Where, as under Florida's death-sentencing procedure (*see Proffitt v. Florida*, 44 U.S.L.W. 5256, 5258 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court)), a "new finding of fact . . . that was not an ingredient of the offense charged" has to be made in

order to support a particular sentencing outcome, then "[d]ue process . . . requires that [the defendant] . . . be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 608, 610 (1967). *Accord: Humphrey v. Cady*, 405 U.S. 504 (1972).

These constitutional commands are particularly exacting in death cases. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id.* at 77 (concurring opinion of Justice Harlan). For a cardinal purpose of both the right to counsel and the rudimentary safeguards of procedural due process is to "enhance the reliability of the fact-finding process." *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966); *see also Jackson v. Denno*, 378 U.S. 368, 387-389 & n.16 (1964); *Stovall v. Denno*, 388 U.S. 293, 297-299 (1967); *Berger v. California*, 393 U.S. 314, 315 (1969); *Williams v. United States*, 401 U.S. 646, 653 & n.6 (1971) (plurality opinion of Mr. Justice White). Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . , there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5275 (U.S., July 2, 1976) (footnote omitted) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court). And a case in which a jury has determined on the basis of trial-tested evidence that death is *not* the appropriate punishment obviously

presents the most manifest need to assure the reliability of any out-of-court information which the sentencing judge may receive and consider in overruling the jury's judgment and imposing a death sentence.

It follows that the non-disclosure of a portion of a PSI report prepared specifically for the purpose of capital sentencing, reviewed by the judge for that purpose, and withheld from the defense without explanation or stated justification, violates both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Both the right to counsel and the basic "requirement of fair play" were invoked in *Townsend v. Burke, supra,* 334 U.S. at 741, to hold that a "sentence . . . predicated on misinformation or misreading of court records" cannot stand. *Ibid.* Townsend, to be sure, had no lawyer at all. But a lawyer who is called upon to speak against the sentence of death and who is simultaneously deprived of knowledge of the factual information upon which the sentencing judge proposes to consider inflicting the extreme penalty is not appreciably better.[19] "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." *Marion v. Beto*, 434 F.2d 29, 32 (CA5 1970). In the presentation of effective argument to a decision-maker upon that question, "consultation, thoroughgoing investigation and preparation [are] . . . vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). "[T]he denial of

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[19] Although *Townsend* was "specifically concerned with the right to the assistance of counsel, it would have been an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and an opportunity to be heard." *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (dictum).

opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (dictum).

Townsend firmly establishes that sentencing "on the basis of assumptions . . . which [are] . . . materially untrue . . . , whether caused by carelessness or design, is inconsistent with due process of law." 334 U.S. at 741.[20] Manifestly, the only way in which this substantive rule can be made effective is by recognition of an accompanying procedural right to disclosure (or at least to a reviewable determination of good cause for non-disclosure) of factual materials under consideration by the sentencer. For "[t]here is no irrebuttable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable limits . . . , to examination, criticism and refutation." *Kent v. United States*, 383 U.S. 541, 563 (1966). The point that substantive constitutional rights constitutionally require adequate

[20] *See, e.g., United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Malcolm*, 432 F.2d 809, 816 (CA2 1970); *United States ex rel. Jackson v. Myers*, 374 F.2d 707, 710-711 (CA3 1967); *United States v. Janiec*, 464 F.2d 126, 129-130 (CA3 1972); *United States v. Espinoza*, 481 F.2d 553, 555 (CA5 1973); *United States v. Rollerson*, 491 F.2d 1209, 1213 (CA5 1974); *Shelton v. United States*, 497 F.2d 156, 159 (CA5 1974); *Collins v. Buchkoe*, 493 F.2d 343, 345-346 (CA6 1974); *United States v. Weston*, 448 F.2d 626, 632-634 (CA9 1971).

procedures to assure their implementation is no novelty. *See, e.g., Carter v. Texas*, 177 U.S. 442 (1900); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Jackson v. Denno*, 378 U.S. 368 (1964); *Smith v. Illinois*, 390 U.S. 129 (1968); *Simmons v. United States*, 390 U.S. 377 (1968); *Boykin v. Alabama*, 395 U.S. 238 (1969); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Ham v. South Carolina*, 409 U.S. 524 (1973). Here, the only alternative to requiring disclosure of sentencing information in a manner and at a time that permits its contemporary investigation and correction, rebuttal, or explanation by the defense is to leave the right recognized by *Townsend* subject to invisible denials, or to vindication by sheer accident *if* the undisclosed material somehow happens later to turn up, *see, e.g., Giles v. Maryland*, 386 U.S. 66, 74 (1967) (plurality opinion of Mr. Justice Brennan), and if it can *then* be proved erroneous notwithstanding all of the difficulties that attend retrospective litigation of such issues, *see, e.g., Rogers v. Richmond*, 365 U.S. 534, 547-548 (1961); *Drope v. Missouri*, 420 U.S. 162, 183 (1975).

Moreover, quite apart from *Townsend*, the principle of *Specht v. Patterson, supra,* forbids affirmance of petitioner's death sentence following consideration by his sentencer of materials which petitioner was given no opportunity to review for purposes of possible refutation, explanation, or interpretation "from the point of view most favorable to him," *Herring v. New York*, 422 U.S. 853, 864 (1975). Like the Colorado Sex Offenders Act involved in *Specht*, Florida's bifurcated capital-trial procedure requires "[s]eparate proceedings" following conviction, Fla. Stat. Ann. §921.141(1) (1976-1977 supp.), in which new

"[f]indings in support of sentence of death" must be made, Fla. Stat. Ann. §921.141(3) (1976-1977 supp.), over and above the elements of first-degree murder; and "[i]f the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment," Fla. Stat. Ann. §921.141(3) (1976-1977 supp.). Specifically,

> "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> "(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
>
> "(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings."

Fla. Stat. Ann. §921.141(3) (1976-1977 supp.).

Upon the new issues thus presented, petitioner could not constitutionally be denied " 'reasonable notice and an opportunity to be heard' " in response to all of the factual information considered by the fact-finder. *Specht v. Patterson, supra,* 386 U.S. at 610, quoting *Oyler v. Boles,* 368 U.S. 448, 452 (1962). He would have been entitled to such basic fair procedures even in a civil proceeding in which his life was not at stake. For "[i]t goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 427 (1957). If a litigant "is to present his case effectively . . . , he must be cognizant of all the facts before the

[decision-maker]," *Gonzales v. United States*, 348 U.S. 407, 413 (1955), and aware "of the recommendations and arguments to be counted," *id.* at 415. Accordingly, Due Process gives him the right "to know the thrust of [an advisory] . . . recommendation [considered by the decision-maker] so he [can] . . . muster his facts and arguments to meet its contentions." *Id.* at 414. *Cf. Mathews v. Eldridge*, 47 L.Ed.2d 18, 39-40 (1976).

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in [even] a quasi-judicial proceeding . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Morgan v. United States, 304 U.S. 1, 18-19 (1938). *Accord: Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963). "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Green v. McElroy*, 360 U.S. 474, 496 (1959). " 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.' " *Goss v. Lopez*, 419 U.S. 565, 580 (1975), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951). (concurring opinion of Justice Frankfurter). These precepts define a

"fundamental requisite of due process" in any proceeding, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); and if they are indispensable in civil or administrative matters, they are indispensable *a fortiori* in the meting out of criminal punishments.[21]

It is therefore clear why the disclosure of presentence investigation reports has been found to be a fundamental element of fair sentencing procedures by the American Bar Association,[22] the American Law In-

[21] *See* note 40 *infra.*

[22] The relevant ABA standard, approved by the House of Delegates in 1968, provides:

> "(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.
>
> "(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Standard 4.4 (Approved Draft, 1968) [hereafter cited as ABA STANDARDS], at pp. 213-214.

stitute,[23] the National Council on Crime and Delinquency,[24] the President's Commission on Law Enforcement and Administration of Justice,[25] and the National

[23] The A.L.I. Model Penal Code requires the court to advise "the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them." It includes a proviso that "[t]he sources of confidential information need not, however, be disclosed." AMERICAN LAW INSTITUTE, MODEL PENAL CODE §7.07(5) (Proposed Official Draft, 1962), at p. 118. The Advisory Committee wrote that "[l]ess disclosure than this hardly comports with elementary fairness." *Id.*, Comment 2 to §7.07 (Tent. Draft No. 2, 1954), at p. 55.

[24] The NCCD's Model Sentencing Act provides for mandatory disclosure of presentence investigation reports considered in the extended sentencing of dangerous offenders. ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §4 (1963). Disclosure is discretionary in the case of less severe sentences, *ibid.*, but "when the defendant is a dangerous offender, the length of the commitment and the character of the findings required before sentence may be imposed are such that due process requirements suggest additional safeguards for the defendant. Accordingly, the Act requires that the presentence investigation and clinical reports be made available to him." *Id.*, Comment on Article II, at p. 15.

[25] The National Crime Commission recommended that "[i]n the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." PRESIDENT's COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 20 (1967) [hereafter cited as TASK FORCE REPORT].

Advisory Commission on Criminal Justice.[26] With few exceptions,[27] scholarly opinion also solidly supports some measure of mandatory disclosure of presentence reports.[28] The exceptions present no obstacle to the constitutional rule which we urge in the present case

[26] The Commission concluded that "[s]entencing courts immediately should adopt a procedure to inform the defendant of the basis for his sentence and afford him the opportunity to challenge it." Specifically," [t]he presentence report and all similar documents should be available to defense counsel and the prosecution." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, STANDARDS AND GOALS: CORRECTIONS, Standard 5.16 (1973), at pp. 188-189. The Commission also determined that no exceptions should be made on grounds of confidentiality. *Id.*, Commentary to Standard 5.16, at p. 189.

[27] *See* P. KEVE, THE PROBATION OFFICER INVESTIGATES 6-15 (1960); Barnett and Gronewold, *Confidentiality of the Presentence Report*, 26 FED. PROB. (No. 1) 26 (March 1962); Hincks, *In Opposition to Rule 32(c)(2), Proposed Federal Rules of Criminal Procedure*, 8 FED. PROB. (No. 4) 3 (Oct.-Dec. 1944); Parsons, *The Presentence Investigative Report Must Be Preserved as a Confidential Document*, 28 FED. PROB. (No. 1) 3 (March 1964); Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206 (1965); Sharp, *The Confidential Nature of Presentence Reports*, 5 CATH. U. L. REV. 127 (1955); Wilson, *A New Arena is Emerging to Test the Confidentiality of Presentence Reports*, 25 FED. PROB. (No. 4) 6 (Dec. 1961); *Federal Judge's Views on Probation Practices*, 24 FED. PROB. (No. 1) 10 (March 1960).

[28] *See* M. FRANKEL, CRIMINAL SENTENCES 27-33 (1973); S. RUBIN, CRIME AND JUVENILE DELINQUENCY 195-204 (1961); P. TAPPAN, CRIME, JUSTICE, AND CORRECTION 558 (1960); Bach, *The Defendant's Right of Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (April 1968); Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); Gray, *Post-Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOLEDO L. REV. 1 (1972); Guzman, *Defendants'*

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because the reasons they advance against disclosure are either inapplicable here or invoke considerations that can be accommodated by permitting non-disclosure for good cause shown in discrete and limited situations[29] –an issue which, as we have indicated, is simply not raised on this record.

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Access to Presentence Reports in Federal Criminal Cases, 52 IOWA L. REV. 161 (1966); Harkness, *Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 HASTINGS CONST. L.Q. 1065 (1975); Higgins, *Confidentiality of Pre-Sentence Reports*, 28 ALBANY L. REV. 12 (1964); Kadish, *The Advocate and the Expert: Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 806 (1961); Katkin, *Pre-Sentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970); Kuh, *For a Meaningful Right to Counsel on Sentencing*, 57 A.B.A.J. 1096 (1971); Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969); Lowensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W. VA. L. REV. 159 (1967); Rubin, *Sentences Must Be Rationally Explained*, 42 F.R.D. 203, 215-216 (1967); Schaffer, *The Defendant's Right of Access to Presentence Reports*, 3 CRIM. L. BULL. 674 (Dec. 1967); Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 FED. PROB. (No. 4) 8 (March 1964); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291-1292 (1954); Zastrow, *Disclosure of the Presentence Report*, 35 FED. PROB. (No. 4) 20 (Dec. 1971); Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527 (1975); Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUTGERS-CAMDEN L.J. 111 (1971); Note, *The Pre-sentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L. F. 451 (1970); Comment, *Federal Rules of Criminal Procedure 32(c)(2); Confidentiality or Constitutionality*, 2 LINCOLN L. REV. 66 (1966).

[29] Advocates of nondisclosure customarily cite three reasons for their position. First, they argue that disclosure would tend to

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On the other hand, the principal reasons which the overwhelming number of authorities have accepted as supporting a requirement of mandatory disclosure

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dry up sources of information. Members of the defendant's family, employers or other informants would be reluctant to supply information if they knew that it could be traced back to them, and agencies which supplied information only on a confidential basis would make their records unavailable to probation officers. Second, it is contended that disclosure would cause unreasonable delay in sentencing because defendants would challenge everything in every presentence report, and thereby transform the sentencing determination into a lengthy and burdensome proceeding. Finally, it is argued that to disclose the contents of the presentence report might be harmful to rehabilitative efforts, especially where the report contains psychiatric evaluations or unfavorable comments by the probation officer who might be assigned to supervise the defendant.

The problem with these arguments, of course, is that they do not support a general rule or policy of nondisclosure, although they are sometimes used quite inexplicably by their proponents for that purpose. The ABA Advisory Committee has rightly criticized the latter form of argument on the ground that "each [objection to disclosure] is aimed at a specific evil which may indeed be a legitimate cause for concern, but yet is generally asserted as supporting nondisclosure in all cases irrespective of the existence of even a remote possibility in the particular case of the actual occurrence of the feared ABA STANDARDS, *supra* note 22, at 218. Once the fallacy of over-generalization is avoided, it becomes plain that the several common arguments for non-disclosure are, in fact, altogether consistent with a general rule of disclosure subject to, at most, some limited exceptions. This is plainly the case insofar as a presentence investigation report may include information from confidential informants or unsettling psychiatric evaluations. And concern lest defendants' responses to the PSI get out of hand can be met by controlling the form and length of those responses, rather than by totally denying any opportunity to respond. *Cf. Herring v. New York, supra,* 422 U.S. at 862-863. Significantly, none of the fears of adverse consequences of disclosure has been borne out by the

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(except, perhaps, for good cause shown in special situations) go to the heart of this case. The first and most important reason is that "fundamental fairness requires that the accused be given a reasonable opportunity to challenge the accuracy of facts or the reliability of opinions on which the judge will base his sentencing decision."[30] The second is that, without

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experience of the jurisdictions in which presentence reports have routinely been given to the defense for many years. *See, e.g., State v. Kunz,* 55 N.J. 128, 259 A.2d 895, 897 (1969); *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678, 681-682 (1973); ABA STANDARDS, *supra* note 22, at 219-220; *Guzman, supra* note 28, at 168-169; Higgins, *supra* note 28, at 31-32; Thomsen, *supra* note 28, at 9; Zastrow, *supra* note 28, at 21-22; HASTINGS Note *supra* note 28, at 1542-1543; RUTGERS-CAMDEN Note, *supra* note 28, at 124-125.

In any event, the constitutional rule which we urge here goes no further than death cases. In such cases, concern for the traumatic effect of disclosure upon the defendant, or for interference with his "rehabilitation", approaches a cruel joke. The number of capital trials is hardly sufficient to support apprehension that the system of criminal justice in this country cannot take the time for careful review of facts considered as the basis for a death sentence; indeed, in view of the stakes, it is intolerable to suggest that those facts *not* be painstakingly examined. There remains, therefore, the question of confidential informants–a narrow enough problem with which this Court has been able to deal in other contexts, *see* note 15 *supra*, and which surely can be treated on a special footing in the present context if and when the issue arises–as here it does not.

[30] ABA STANDARDS, *supra* note 22, at 218. *See also* TASK FORCE REPORT, *supra* note 25, at 20; RUBIN, *supra* note 28, at 200-203; TAPPAN, *supra* note 28, at 558; Bach, *supra* note 28, at 170; Gray, *supra* note 28, at 4; Guzman, *supra* note 28, at 164-166; Harkness, *supra* note 28, at 1068; Higgins, *supra* note 28, at 25-29; Lehrich, *supra* note 28, at 238-246; Lowensen, *supra* note 28, at 164; Rubin, *supra* note 28, at 216-217; Wyzanski, *supra* note 28, at 1291; GEORGETOWN Note, *supra* note 28, at 473-475; HARVARD Note, *supra* note 28, at 836-838; HASTINGS Note, *supra* note 28, at 1537.

access to the information which the sentencing judge will consider, the defendant's right to effective assistance of counsel at sentencing is rendered illusory.[31] The third is that disclosure is essential to the appearance of fairness, a rudimentary goal of the criminal process.[32] Surely no less in capital cases than in others, " 'justice must satisfy the appearance of justice.' " *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). "If [an offender] . . . is sentenced on information that he has not seen or had any chance to deal with and rebut, he cannot believe that he has been treated with impartiality and justice." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, STANDARDS AND GOALS, Commentary to Standard 5.16 (1973), at p. 189. One might contend that it does not matter what the defendant thinks when he will soon be dead. But that contention cannot be justified within the framework of a constitutional scheme that requires capital punishment to be administered in "accord with 'the dignity of man.' " *Gregg v. Georgia*, 44 U.S.L.W. 5230, 5236 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court), quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

Also obviously applicable is Professor Kenneth Culp Davis' more general observation that "[o]penness is the natural enemy of arbitrariness and a natural ally in the

[31] *See* Kuh, *supra* note 28, at 1096; HASTINGS Note, *supra* note 28, at 1537-1539; RUTGERS Note, *supra* note 28, at 115.

[32] *See, e.g.*, ABA STANDARDS, *supra* note 22, at 224; Harkness, *supra* note 28, at 1071.

fight against injustice."[33] For "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); and we hardly need to labor the especial concern of the Constitution against arbitrariness in capital sentencing in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972).[34]

The considerations which have persuaded commissions and commentators have also persuaded legislatures and courts. Recently enacted statutes,[35] recently

[33] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 98 (1971). *See also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Justice Frankfurter):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however, suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

[34] *See Gregg v. Georgia*, 44 U.S.L.W. 5230, 5240, 5242 n.47 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *id.* at 5250 (opinion of Mr. Justice White, with whom the Chief Justice and Mr. Justice Rehnquist joined); *Woodson v. North Carolina*, 44 U.S.L.W. 5267, 5274 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *Roberts v. Louisiana*, 44 U.S.L.W. 5281, 5283-5284 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[35] Since 1972, thirteen States have joined the number that provide by statute for some measure of mandatory disclosure of presentence reports: Arkansas (1975); Connecticut (1973); Hawaii (1972); Illinois (1972); Indiana (1973); Kansas (1973); Kentucky (1974); Maryland (1972); New Hampshire (1973); New York (1975); Oklahoma (1975); Oregon (1973); Utah (1973). *See* Appendix A *infra*.

promulgated rules,[36] and recent judicial decisions[37] demonstrate an accelerating and "significant movement

[36]Since 1972, eight States have promulgated rules of court providing for some measure of mandatory disclosure of presentence reports: Alaska (1974; Arizona (1972); Colorado (1974); Michigan (1973); New Mexico (1975); Ohio (1973); Pennsylvania (1973); Washington (1975). *See* Appendix A *infra.*

[37]For example, in *State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969), the Supreme Court of New Jersey announced that "in all future sentencing proceedings, defendants will be entitled to disclosure of the presentence report, with fair opportunity to be heard on any adverse matters relevant to the sentencing." 259 A.2d at 903. This step was not taken "as a matter of constitutional compulsion" ("[a]lthough persuasive constitutional arguments have been advanced") but "as a matter of rudimentary fairness." *Ibid.* In particular, the court noted that

> "[i]t is indeed difficult to see how there can be meaningful representation by counsel at sentencing time when there is no disclosure to him of the presentence materials on which the sentence is being based. And surely without such materials he is in no fair position to determine . . . how to prosecute [an appeal from the sentence] . . . if it is taken."

259 A.2d at 900. Four years later the Supreme Court of Pennsylvania agreed "with the New Jersey Supreme Court that 'even apart from the overriding consideration of fairness and justness, [disclosure] will serve to improve and strengthen probation reports by promoting greater accuracy on the part of the officials as well as the persons who supply information to them.'" *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678, 683 (1973). After carefully reviewing all of the arguments advanced against disclosure and finding that none of them supported anything more than a limited exception to the general requirement of mandatory disclosure of all presentence materials, 301 A.2d at 681-683, the court adopted ABA Standard 4.4, set out in note 22 *supra*, because "the efficient and just administration of criminal justice is best served by the appropriate disclosure of relevant portions of [the presentence] . . . report, not secured on a promise of confidentiality." 301 A.2d at 679. With regard to the latter exception, the court

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towards mandatory disclosure." *State v. Kunz*, 55 N.J. 128, 259 A.2d 895, 899 (1969). We summarize these developments in Appendices A and B *infra* (dealing respectively with the several States and the federal courts), for the purpose of showing the extent and force of contemporary recognition of the basic point of our argument:[38] "that disclosure ought to be the preferred and presumed rule, subject only to exceptions for rare and unique cases where the judge perceives specific dangers or injuries to be avoided."[39]

Those appendices also show that even if the rule for which we argue were extended to all sentences for felonies, it would conform to current practice in the large majority of States and in the federal system. But we need not here burden the Court with such a demonstration. This is a death case; "death is different in kind from any other punishment imposed under our system of criminal justice," *Gregg v. Georgia*, 44

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highlighted the ABA provision permitting non-disclosure "'[*i*]*n extraordinary cases*, [of] . . . sources of information . . . obtained on a promise of confidentiality,'" 301 A.2d at 682 (emphasis supplied by the court); and it insisted that, where this exception is invoked, adequate procedures must be followed to permit appellate review of its applicability. 301 A.2d at 682 n.6. The Oregon Supreme Court in *Buchea v. Sullivan*, 262 Ore. 222, 497 P.2d 1169 (1972), also recognized the importance of protecting confidential sources in appropriate situations, but held that "it would be a deprivation of due process and of the services of counsel to withhold . . . information [where] . . . no countervailing public interest [such as confidentiality] requires its non-disclosure." 497 P.2d at 1177. *See also State v. Pierce*, 108 Ariz. 174, 494 P.2d 696 (1972).

[38]*See Bloom v. Illinois*, 391 U.S. 194, 202-208 (1968); *Mullaney v. Wilbur*, 421 U.S. 684, 694-696 (1975).

[39]M. FRANKEL, CRIMINAL SENTENCES 31 (1973).

U.S.L.W. 5230, 5240 (U.S., July 2, 1976) (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court). It is axiomatic that "[t]he extent to which procedural due process must be afforded [an individual] . . . is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (concurring opinion of Justice Frankfurter).[40] In the proceedings below and here, petitioner stood and stands to lose his life; we submit only that he was constitutionally entitled (1) to know the information considered by his sentencer as the basis for inflicting *that* loss, or (2) at least to have a reviewable finding of good cause why such knowledge was denied him, and to have any undisclosed information transmitted under seal to the Florida Supreme Court, which must and does consider "the total record," *Swan v. State*, 322 So.2d 485, 489 (Fla. 1975), in the exercise of its "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted," *Songer v. State*, 322 So.2d 481, 484 (Fla. 1975) (footnote omitted).

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[40] This court has repeated in many decisions applying the Due Process Clause that "[t]he formality and procedural requisites for the hearing [which the Constitution demands] can vary, depending on the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (footnote omitted). *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 520 (1944); *Hannah v. Larche*, 363 U.S. 420, 440-442 (1960); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Morrissey v. Brewer*, 408 U.S. 471, 481-490 (1972); *Mathews v. Eldridge*, 47 L.Ed.2d 18, 33-42 (1976).

Neither *Williams v. New York*, 337 U.S. 241 (1949), nor *Williams v. Oklahoma*, 358 U.S. 576 (1959), opposes that conclusion. Both *Williams* cases arose under sentencing procedures which, unlike Florida's present bifurcated-trial scheme, required no new finding of fact to support the imposition of a death sentence upon a defendant convicted of first-degree murder. They were thus distinguished in *Specht v. Patterson*, 386 U.S. 605, 608 (1967), and are similarly distinguishable here. And neither *Williams* case involved a constitutional issue relating to non-disclosure.

> "Although several courts, including our own, two leading commentators and the Advisory Committee [on the Federal Criminal Rules] have read Williams v. New York . . . as holding that the failure to disclose the contents of a presentence report to a defendant involves no violation of due process . . . , the issue was not presented in that case, as the Court itself explicitly recognized, 337 U.S. . . . at 252 n.18 . . . since the contents of the report there in question had been fully disclosed to the defendant in open court.[41] Because of this disclosure, the case was decided solely under the Confrontation Clause of the Sixth Amendment. This was also the conclusion reached in ABA Standards, [*supra* note 22] . . . , at 224. Similarly, in Williams v. Oklahoma . . . , another case sometimes cited for the proposition that due process does not require disclosure of any part of a presentence report, disclosure was not at issue since the unsworn incriminating statements by the prosecutor at the time of sentencing was made in the presence of the defendant who acknowledged the truth of the charges being made.[42]

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[41] *See Williams v. New York, supra*, 337 U.S. at 244, 252.

[42] *See Williams v. Oklahoma, supra*, 358 U.S. at 579-584.

"The only Supreme Court case which could be read as approving a fixed policy of nondisclosure is Specht v. Patterson. . . . In that case, Justice Douglas, writing for the majority, characterized Williams v. New York in dicta[43] as holding that due process does not require judges 'to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed.' [386 U.S.] . . . at 606. . . . Justice Douglas, whose strong views favoring mandatory disclosure are well known . . . , immediately went on, however, to indicate that the real issue in *Williams* was the use of out-of-court statements at sentencing and not the propriety of their disclosure."

United States v. Picard, 464 F.2d 215, 218-219 n.4 (CA1 1972).

We add one point. Since *Furman v. Georgia, supra*, it is no longer true that "the judge here [could have] . . . sentenced [petitioner] . . . to death giving no reason at all." *Williams v. New York, supra*, 337 U.S. at 252. The thrust of this Court's death penalty decisions of July 2, 1976, is to approve[44] and demand[45] a

[43] There is also a dictum in *Gregg v. United States*, 394 U.S. 489, 492 (1969), that "[p]resentence reports are documents which [Fed. Rule Crim. Pro. 32] . . . does not make available to the defendant as a matter of right." But *Gregg* presented no issue of disclosure under either Rule 32 (which was amended in 1975 and now *does* require disclosure as a matter of right, *see* Appendix B *infra*) or under the Constitution.

[44] *Gregg v. Georgia, supra*, 44 U.S.L.W. at 5243, 5246 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

[45] *Woodson v. North Carolina, supra*, 44 U.S.L.W. at 5274 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court); *Roberts v. Louisiana, supra*, 44 U.S.L.W. at 5283-5284 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court).

capital-sentencing procedure that "requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant," *Proffitt v. Florida, supra*, 44 U.S.L.W. at 5259 (opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court), by conducting "an informed, focused, guided, and objective inquiry into the question whether [the sentence shall be] . . . death," *id.* at 5261. It makes a mockery of this process to deny the defendant notice and an opportunity to respond to information which is the subject of the "focus," and simultaneously to strip the record of the necessary factual predicate for informed review of his death sentence by the Florida Supreme Court and this Court.

B. The Court Has and Should Exercise Jurisdiction to Hear and Decide the Question Presented

The question whether the trial judge properly considered the presentence report without disclosing part of it to petitioner was raised in petitioner's Assignments of Error to the Florida Supreme Court (A. 148), and in petitioner's briefs in that court. *See* pp. 27-29 *supra*. Petitioner emphasized that "[t]he confidential portion of the report is not in the record, and neither appellant nor his counsel can examine that portion of the report," Reply Brief of the Appellant in *Daniel Wilbur Gardner v. State of Florida*, Fla. Sup. Ct. No. 45106, at 20. Two dissenting Justices below accordingly concluded that the undisclosed portion of the presentence report was "absolutely unknown to and

therefore unrebuttable by Appellant," and that this non-disclosure was "fundamental error" requiring the reversal of petitioner's death sentence. *Gardner v. State*, 313 So.2d 675, 678 (Fla. 1975). However, since the Florida Supreme Court's opinion affirming petitioner's conviction is brief and elliptical, *see* pp. 11-12 *supra*, and since "it will be assumed that the omission [of explicit consideration of a federal constitutional question in the opinion of a state appellate court] was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary," *Street v. New York*, 394 U.S. 576, 582 (1969); *see also Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919), it becomes necessary to consider whether petitioner's failure to object to non-disclosure at trial, and the opacity of the record as to whether the Florida Supreme Court considered this issue as a federal constitutional claim on appeal, foreclose this Court's consideration of the claim. We submit that the Court has and should exercise jurisdiction to determine the claim.

In capital cases, the Florida Supreme Court has a settled practice, established by its rules and recognized in its precedents, of considering *all* significant prejudicial errors, whether a contemporaneous objection was made or not, which its independent review of the record reveals. "[I]n appeals where the death penalty has been imposed, we feel it our duty to overlook technical niceties in the interest of justice," *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957). Florida Appellate

Rule 6.16,[46] which the court below cited in its majority and dissenting opinions, *Gardner v. State, supra*, 313 So.2d at 676-677, 677 (A. 151, 152), authorizes the court "in its discretion, if it deems the interests of justice to require, [to] review any other things said or done in the cause [to which no objection had been raised] which appear in the appeal record" (Rule 16.6(a)), and also, in the case of a "defendant who has been sentenced to death . . . [to] review the evidence to determine if the interests of justice require a new trial" (Rule 16.6(b)). Rule 3.7(i), Fla. R. App. P. (1976 spec.

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[46] Rule 6.16, Fla. R. App. P. (1976 spec. pamphlet), in its entirety provides:

"*Scope of Review*

a. *Generally.* Upon an appeal by either the state or the defendant the appellate court shall review all rulings and orders appearing in the appeal record insofar as it is necessary to do so in order to pass upon the grounds of appeal. The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence when there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury. The reception of evidence to which no objection was made shall not be construed to constitute a ruling by the court.

b. *Sufficiency of Evidence.* Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Rule 6.16 is derived from and identical to former Fla. Stat. Ann. §924.32 (Comp. Gen. Laws Supp. 1940).

pamphlet), provides that "the Court, in the interest of justice, may notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error, or of an objection or exception in the court below." *See Henderson v. State*, 155 Fla. 487, 20 So.2d 649, 651 (1945); *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970); *Palm Beach County v. Green*, 179 So.2d 356, 362-363 (Fla. 1965).

The Florida Supreme Court has liberally construed these rules to consider errors in death cases where no contemporaneous objection was raised at trial or where no assignment of error was made on appeal. The court has asserted its "responsibility and obligation . . . to deal cautiously with judgments imposing the extreme penalty," *Williams v. State*, 117 So.2d 473, 476 (Fla. 1960), since "[t]here is absolute finality in an executed sentence of death," *Wells v. State, supra*, 98 So.2d at 801. An exceptionally careful independent scrutiny of the record for error is exercised in capital cases because "errors which could make the difference between life and death can hardly be deemed harmless and trivial." *Pait v. State*, 112 So.2d 380, 386 (Fla. 1959). *See also Raulerson v. State*, 102 So.2d 281, 286 (Fla. 1958); *Coley v. State*, 185 So.2d 472, 474, 476 (Fla. 1966). The court has frequently indicated that it has surveyed the record for *all* error;[47] and it has reversed a number

[47] *See, e.g., Baker v. State*, 241 So.2d 683, 687 (Fla. 1970); *Alvord v. State*, 322 So.2d 533, 541 (Fla. 1975); *Miller v. State*, 332 So.2d 65, 68 (Fla. 1976). *And see Burnette v. State*, 151 So.2d 9, 10 (Fla. 1963) (case remanded so full record could be prepared to enable the court "to discharge the duties and responsibilities [of comprehensively reviewing the record in a capital case] imposed upon us by the laws of this State and required by our own rules.") In *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963), the court emphasized: *(continued)*

of capital convictions for error that was not objected to at trial[48] or assigned as error on appeal.[49]

Recently, in vacating a death sentence and remanding for resentencing in *LaMadline v. State*, 303 So.2d 17 (Fla. 1974), the court emphasized that it does not presume waiver where a death-sentenced defendant at trial fails affirmatively to request "an essential" procedural right in capital sentencing proceedings (specifically in *LaMadline*, the right to have a jury make an advisory sentencing recommendation after a guilty plea to a capital charge):

(footnote continued from preceding page)

> "[t]he rules of this Court and the statutes of this State provide that in causes of this nature this Court may in its discretion, if it deems the interests of justice to so require, review anything said or done in the cause which appears in the appeal record, including instructions to the jury, whether or not exception is taken thereto at the time. While this rule and the statute have not been applied in all instances, it has been closely and strictly adhered to in cases where the supreme penalty has been imposed by the judgment under review."

[48] *See Anderson v. State*, 276 So.2d 17, 19 (Fla. 1973); *Singer v. State*, 109 So.2d 7, 28 (Fla. 1959); *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957); *Bennett v. State*, 127 Fla. 759, 173 So. 817, 819 (1937); *Harrison v. State*, 149 Fla. 365, 5 So.2d 703, 707 (1942); *Grant v. State*, 194 So.2d 612, 613 n.1, 616 (Fla. 1967); *Pait v. State*, 112 So.2d 380, 384-386 (Fla. 1959); *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963). *Cf. State v. Jones*, 204 So.2d 515, 518-519 (Fla. 1967) (first degree murder conviction where sentence of life imprisonment imposed).

[49] *Wells v. State, supra*, 98 So.2d at 801-802 (alternative ground); *Williams v. State*, 117 So.2d 473, 476 (Fla. 1960) (dictum); *Bennett v. State, supra*, 173 So. at 819-820 (alternative ground); *Pait v. State, supra*, 112 So.2d at 386 (alternative ground).

> "[t]his is an essential right of the defendant under our death penalty legislation, though it may be waived. The question before this Court is whether the appellant has waived this right. We cannot presume a waiver where the record is silent, Boykin v. Alabama, supra [395 U.S. 238 (1969)]; Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); and the failure to either object or request the jury sentencing procedure cannot constitute such a waiver. We hold that the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty . . . This record reflects no such waiver."

LaMadline v. State, supra, 303 So.2d at 20. And in *Songer v. State*, 322 So.2d 480 (Fla. 1975), the court decided (albeit adversely) a claim that a death-sentencing judge had improperly considered a pre-sentence investigation report, notwithstanding that no contemporaneous objection was made in the trial court:

> "[a]s for Appellant's objection to the trial court's consideration of the presentence investigation report, we find no error in that consideration. . . . We observe that Appellant did not object to such consideration and that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing."[50]

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[50] The Florida Supreme Court did ignore the fact that part of the PSI had *not* been disclosed to appellant Songer (*see* Record on Appeal in *Carl Ray Songer v. State of Florida*, Fla. Sup. Ct. No. 45106, at 485) and that this was the basis of Appellant Songer's Assignment of Error No. 10 to the trial judge's "considering [of] the pre-sentence investigation of defendant." (The trial judge in Songer was also the Hon. John W. Booth, *see* p. 26, *supra*). The *Songer* case is pending in this Court on petition for certiorari, *Songer v. Florida*, No. 75-5800, and presents the same question raised in the present case.

Songer v. State, supra, 322 So.2d at 484.

Certainly, the consitutional contention that the sentencing judge should not have considered the presentence investigation report while withholding a portion of it from petitioner was raised with less than perfect exactness in petitioner's Assignments of Error and in his briefs in the Florida Supreme Court. However, his complaint about the use of the undisclosed portion of the PSI in sentencing him to death was reiterated several times in varying forms in sections of the briefs developing the relevant Assignments of Error, *see* pp. 27-29 *supra*, and any question regarding the adequacy of this presentation should be resolved in his favor for several reasons.

First, "[i]n death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter). *See also Stein v. New York*, 346 U.S. 156, 196 (1953); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Reid v. Covert, supra*, 354 U.S. at 77-78 (concurring opinion of Justice Harlan).

Second, the record establishes that petitioner clearly intended, however inartfully, to invoke the Due Process Clause in challenging the trial court's consideration of the undisclosed portion of the PSI report before sentencing him to death. This Court has refused to take a restrictive view of the manner in which due process claims may be raised and preserved below, even in

non-capital cases.[51] In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), for example, the appellant had relied "upon the Commerce Clause on [the] . . . issue [of the constitutionality of a state tax] and . . . not specifically claim[ed] protection under the Due Process Clause of the Fourteenth Amendment." *Id.* at 598. However, the Court noted that appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. "Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 598-599.[52]

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of

[51] *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968); *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 269-271 (1891); *Murray v. Charleston*, 96 U.S. 432, 440-441 (1878); *Spencer v. Merchant*, 125 U.S. 345, 352 (1888).

[52] Insofar as petitioner's constitutional claim relies upon the recognition in *Woodson v. North Carolina, supra*, 44 U.S.L.W. at 5275, of the "qualitatively different" "heed for reliability in the determination that death is the appropriate punishment in a specific case," that decision was, of course, not available to petitioner at trial or on appeal. This Court has recognized that "mere failure . . . [to raise a claim] prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967). *See O'Connor v. Ohio*, 385 U.S. 92 (1966); *Smith v. Yeager*, 393 U.S. 122, 126 (1968); *and see Maxwell v. Bishop*, 398 U.S. 262 (1970) (applying *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

> the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if *the record as a whole* shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) (footnote omitted) (emphasis added). *See also Street v. New York*, 394 U.S. 576, 584-585 (1969).

Third, Boykin v. Alabama, 395 U.S. 238 (1969), is directly controlling here. Indeed, in that capital case, the Court acknowledged that the federal constitutional issue on which Boykin's conviction was reversed had been interjected into the case when, "[o]n their own motion . . . four of the seven justices [of the Alabama Supreme Court] discussed the constitutionality of the process by which the trial judge had accepted petitioner's guilty plea." *Id.* at 240.[53] Three of those justices had voted to reach and resolve the issue in Boykin's favor; the fourth had said only that on the record (where no contemporaneous objection appeared) he would not " 'presume that the trial judge had failed to do his duty,' " *id.* at 241, under a proper constitutional standard. The prevailing plurality of the

[53] Justice Harlan's dissenting opinion also notes that "[o]n his appeal to the Alabama Supreme Court, petitioner did not claim that his guilty plea was made involuntarily or without full knowledge of the consequences." *Id.* at 246. Justice Harlan agreed, however, "that we do have jurisdiction to consider the question." *Id.* at 246 n.2.

Alabama Supreme Court in *Boykin* had–like the *per curiam* opinion below here–not discussed the issue. However, in both cases, the majorities of the respective state supreme courts could hardly have failed to understand the nature of the issues discussed by their dissenting brethren; and, in this setting, the Court held that the "error [of accepting Boykin's guilty pleas], under Alabama procedure, was properly before the court below," *id.* at 242, because of Alabama's appellate review rules in death cases:

> "[t]he very Alabama statute . . . that provides automatic appeal in capital cases also requires the reviewing court to comb the record for 'any error prejudicial to the appellant, even though not called to our attention in brief of counsel' . . . The automatic appeal statute 'is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review.' . . . In the words of the Alabama Supreme Court:
>
> > 'Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, . . . we may consider any testimony that was seriously prejudicial to the rights of the appellant and may reverse thereon, even though no lawful objection or exception was made thereto. . . . Our review is not limited to the matters brought to our attention in brief of counsel.' "

395 U.S. at 241-242. Florida's rules of review in death cases are, as we have noted above, precisely the same as Alabama's in this regard.

Finally, Rule 40(1)(d)(2) provides that this Court, "at its option, may notice a plain error not presented." The discretion conferred under this Rule "has been long acknowledged . . . , recently affirmed, . . . and extends

to review of the trial court record." *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974). *See also Brown v. Mississippi*, 297 U.S. 278, 286-287 (1936); *Terminiello v. Chicago*, 337 U.S. 1, 8-9 (1949) (dissenting opinion of Justice Frankfurter). Exercise of the Court's discretion is appropriate in the present case because the factual claim that the trial court erred by considering the presentence investigation report was clearly presented below (whatever the imprecision of its legal articulation); because the dissenting opinion below considered the claim (although admittedly in terms of "fundamental error" without explicit reference to the source of law which established the error); because the majority of the Florida Supreme Court discussed *no* specific issues in its *per curiam* opinion and can therefore hardly be thought to have passed this issue over silently for inadequacy in its presentation; and because the issue is of widespread and crucial importance as "the Florida [supreme] court has ruled that [a Florida trial judge] . . . may order preparation of a presentence investigation report to assist him in determining the appropriate sentence . . . [and t]hese reports frequently contain much information relevant to sentencing," *Proffitt v. Florida, supra*, 44 U.S.L.W. at 5259 n.9. As the Court has noted concerning the predecessor of Rule 40(1)(d)(2):

> "this rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or Bill of Rights."

Weems v. United States, 217 U.S. 349, 362 (1910).

IX.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed insofar as it affirms petitioner's sentence.

Respectfully submitted,

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APPENDIX A: DISCLOSURE OF PRESENTENCE REPORTS IN THE STATE COURTS

The statutes, rules of court or common law doctrines[1] of thirty-six States[2] entitle the defense to some degree of mandatory disclosure of presentence or probation reports. Seventeen States[3] provide for mandatory disclosure of all portions of such reports which a judge may use in felony sentencing; nineteen States[4] make some provision for the withholding of certain

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[1] Because a number of States have moved toward some form of mandatory disclosure of presentence or probation reports within the past four years, *see* pp. 58-60 *supra*, the analysis contained in Annot., *Defendant's Right to Disclosure of Presentence Report*, 40 A.L.R.3d 681 (1971) is somewhat dated. The Annotation also notes that "[s]tate statutory law and court rules are not represented herein except as they are reflected in the decision of the courts in the reported cases, and no attempt is made herein to reflect the current statutory law or court rules of any particular jurisdiction." 40 A.L.R.3d at 684.

[2] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio (rule applies only to "aggravated murder" convictions), Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, Wisconsin, Wyoming.

[3] Alabama, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Kansas, Maryland, New Jersey, New Mexico, North Carolina, Ohio (rule applies only to "aggravated murder" convictions), South Carolina, Utah, Virginia, Wyoming.

[4] Alaska, Arizona, Arkansas, Indiana, Georgia, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Washington, Wisconsin.

kinds of sentencing information, but in nine of these States,[5] the judge must either summarize the factual information withheld,[6] or state for the record his reasons for withholding.[7] There are considerable variations among the States as to when such reports are required and what they may contain. A summary of the law of each State with regard to disclosure of pre-sentence and probation reports follows.

ALABAMA

Probation officers "shall investigate all cases referred to [them] . . . for investigation by any court." Ala. Code tit. 42, §23 (1959). The report of such officers is frequently referred to as a "pre-sentence report," *Moore v. State*, 54 Ala. App. 463, 309 So.2d 500, 501 (1975). The officers' reports "shall be privileged and shall not be available for public inspection except upon order of the court to which the same was referred," but "in no case shall the right to inspect said report be denied the defendant or his counsel after said report has been completed or filed." Ala. Code tit. 42, §23 (1959).

ALASKA

Alaska Stat., R. Crim. P. 32(c)(2) (1975 supp.) provides:

[5] Alaska, Arizona, Indiana, Kentucky, New York, North Dakota, Oklahoma, Oregon, Washington.

[6] Indiana, Kentucky, North Dakota, Oklahoma, Washington.

[7] Alaska, Arizona, New York, Oregon.

> "*Report.* The report of the pre-sentence investigation shall contain any prior criminal conviction including a finding of delinquency of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. No record of arrest or other police contacts shall be included in the report. The report shall be made available to the state's attorney and to the defendant's attorney in all cases and to the defendant unless the court enters on the record findings of reasons why the report would prove detrimental to the rehabilitation of the defendant or safety of the public."

The mandatory disclosure requirement was added in 1974; the prior rule contained no provision relating to disclosure. *See* Alaska Stat., R. Crim. P. 32(c)(2) (1966).

ARIZONA

Ariz. Rev. Stat. Ann., R. Crim. P. 26.4(a) (1975 supp.) provides that "[t]he court shall require a pre-sentence report in all cases in which it has discretion over the penalty to be imposed [except where the penalty is under one year's imprisonment or where a pre-sentence report is already available.]"

In 1972, the Arizona Supreme Court overruled earlier decisions holding that disclosure of the pre-sentence report was within the discretion of the trial court, and adopted rules providing for mandatory disclosure with certain exceptions. *See State v. Pierce*, 108 Ariz. 174,

494 P.2d 696 (1972). Ariz. Rev. Stat. Ann., R. Crim. P. 26(6)(a) (1975 supp.) now provides generally that:

> "[t]he court shall permit the prosecutor and defense counsel, or if he is without counsel, the defendant, to inspect all pre-sentence, diagnostic and mental health reports. A portion of any report not made available to one party shall not be made available to any other."

Disclosure must be made at least two days before the sentencing hearing. Rule 26.6(b) (1975 supp.). However, excision of three kinds of information is permitted:

> "[t]he court may excise from the copy of the pre-sentence, diagnostic and mental health reports disclosed to the parties:
>
> (1) Diagnostic opinions which may seriously disrupt a program of rehabilitation,
>
> (2) Sources of information obtained on a promise of confidentiality, and
>
> (3) Information which would disrupt an existing police investigation.
>
> When a portion of the pre-sentence report is not disclosed, the court shall inform the parties and shall state on the record its reasons for making the excision."

Rule 26.6(c) (1975 Supp.). The next subsection of the Rule provides: "[t]he unexcised reports shall be made available to a reviewing court when a relevant issue has been raised and to a court sentencing the defendant after a subsequent conviction." Rule 26.6(d) (1975 Supp.). Rule 26.6(c) originally provided that "[t]he summary and recommendations of the probation officer" could be excised, but in 1975, the provision allowing nondisclosure of this information was deleted from the Rule.

ARKANSAS

In 1975, Arkansas enacted a statute providing for the mandatory disclosure of the "factual contents and conclusions" of pre-sentence investigation reports except for "[c]onfidential sources of information":

> "*Pre-sentence investigation.*—(1) If punishment is fixed by the court, the court may order a pre-sentence investigation before imposing sentence.
>
> (2) The pre-sentence investigation should be conducted by a pre-sentence officer or other person designated by the court and should include an analysis of the circumstances surrounding the commission of the offense, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, personal habits, and any other matters that the investigator deems relevant or the court directs to be included.
>
> (3) Before imposing sentence, the court may order the defendant to submit to psychiatric examination and evaluation for a period not to exceed thirty (30) days. The defendant may be remanded for this purpose to the State Hospital or the court may appoint a qualified psychiatrist to make the examination and evaluation.
>
> (4) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. Sources of confidential information need not be disclosed.
>
> (5) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence investigation or psychiatric examination shall be transmitted forthwith to the Department of Correction or, when the defendant is committed to

the custody of a specific institution, to that institution."

Ark. Stat. 1947 Ann. §41-804 (1975 spec. pamphlet).

CALIFORNIA

Cal. Penal Code §1203.10 (1970) provides that a trial judge may direct the county probation officer to "inquire into the antecedents, character, history, family environment and offense" of a defendant. The probation officer "must report the same to the court and file his report in writing in the records of said court." (*Ibid.*) Cal. Penal Code §1203d (1970) provides that "[n]o court shall pronounce judgment upon any defendant . . . [as to whom a §1203.10 probation report has been ordered] unless a copy of the probation report has been made available to the court, the prosecuting attorney, and the defendant or his attorney, at least two days or, upon the request of the defendant, five days prior to the time fixed by the court for consideration of the report with respect to pronouncement of judgment." This section also requires the probation report to be filed with the clerk as part of the record in the case. *See also* Cal. Penal Code §1203 (1976 supp.); Cal. Civ. P. Code §§131.3, 131.5 (1976 supp.).

COLORADO

Colo. Rev. Stat. Ann., R. Crim. P. 32(a)(1) (1974) provides that "[i]n any felony case where the court has discretion as to the punishment and on court order in any misdemeanor case, the probation officer shall make

an investigation and written report to the court before the imposition of sentence or granting of probation."

> "The report of the presentence or probation investigation shall state, in addition to any other information required by the court, the defendant's prior criminal record and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence, in granting probation, or in correctional treatment."

Rule 32(a)(2). In 1974, the Colorado Supreme Court adopted a mandatory disclosure rule covering the entire presentence investigation report: "[c]opies of the presentence report including any recommendations as to probation shall be furnished to the prosecuting attorney and defense counsel." Rule 32(a)(2). An identical full-disclosure provision is contained in Colo. Rev. Stat. Ann. §16-11-102(1) (1974).

CONNECTICUT

Conn. Gen. Stat. Ann. §54-109a (1976 supp.) provides that "in any case wherein a presentence investigation is ordered, without a showing of good cause, the court shall provide the defendant or his attorney with a copy of the presentence investigation report at least twenty-four hours prior to the date set for sentencing and . . . shall hear motions addressed to the accuracy of any part of such . . . report." Conn. Gen. Stat. Ann. §53a-46a(c) (1976 supp.) provides:

> "[i]n such hearing [to determine sentence for first degree murder] the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been

prepared. No presentence information withheld from the defendant shall be considered in determining the existence or nonexistence of any of the factors [in aggravation and mitigation] set forth in subsection (f) or (g)."

DELAWARE

Del. Code Ann. tit. 11, §4322(a) (1975) provides:

> "[t]he presentence report (other than a presentence report prepared for the Superior Court or the Court of Common Pleas), the preparole report, the supervision history, and all other case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged and shall not be disclosed directly or indirectly to anyone other than . . . [certain state agencies] except that the court may, in its discretion, permit the inspection of the report or parts thereof by the offender or his attorney or other persons who in the judgment of the court have a proper interest therein, whenever the best interest of the State or welfare of a particular defendant or person makes such action desirable or helpful. . . . The presentence reports prepared for the Superior Court and the Court of Common Pleas shall be under the control of those courts respectively."

Practice in the Superior Court and the Court of Common Pleas is apparently governed by *State v. Moore*, 49 Del. 29, 108 A.2d 675, 680 (1954), in which the Delaware Supreme Court ruled that a defendant was entitled to see his presentence report only if he could demonstrate "unusual circumstances or reasons to justify" disclosure.

FLORIDA

See pp. 6-8 *supra*.

GEORGIA

Ga. Code Ann. §27-2710 (1972) provides:

> "[i]t shall be the duty of the circuit probation supervisor to investigate all cases referred to him by the court and to make his findings and report thereon in writing to such court with his recommendation. The superior court may require, before imposition of sentence, a presentence investigation and written report in each felony case in which the defendant has entered a plea of guilty, nolo contendere or been convicted."

Disclosure generally is governed by the rule of *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792, 798 (1975) (non-capital case) that "if a pre-sentence report contains any matter adverse to the defendant and likely influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the pre-sentence hearing to give the accused an opportunity for explanation or rebuttal." Ga. Code Ann. §27-2503(a) (1975 supp.) provides that at the sentencing hearing in a capital case, "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

HAWAII

The Hawaii Penal Code of 1972, c.6, §604(2) (Hawaii Sess. Laws 1972, art. 9, p. 71) provides:

> "[t]he Court shall furnish to the defendant or his counsel and to the prosecuting attorney a copy of the report of any presentence diagnosis or psychiatric or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them."

See State v. Martin, 56 Hawaii Adv. 5671, 535 P.2d 127, 128 (1975); *State v. Nobriga*, 56 Hawaii 75, 527 P.2d 1269, 1272-1273 (1974).

IDAHO

Idaho Code §19-2515 (1948) provides:

> "[a]fter a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct."

Idaho Code §19-2516 (1948) provides:

> "[t]he circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court

> may direct. No affidavit or testimony, or representation of any kind verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

The entire presentence report must be disclosed whenever it is used by the trial court as a basis for imposing sentence. Whenever "such a report is used by the trial judge as the basis for determining the sentence imposed, or where it might otherwise influence the court in arriving at a sentence, full disclosure of the contents of such report must be made prior to any hearing on the sentence . . . in aggravation or mitigation of punishment in order to comply with the requirements of our statutes [§§19-2515, 19-2516]." *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428, 434 (1968) (sentence vacated because presentence report not disclosed).

(Where a defendant has applied for probation, however, the rules of disclosure are not so stringent. "[T]he trial judge has discretion as to whether the full contents of the pre-sentence report [will] be disclosed to the defendant at the hearing on his application for probation. Where the trial judge chooses not to disclose the report, he is obligated, however, to give the defendant sufficient information concerning adverse matters contained therein so the defendant may be in a position to offer intelligent refutation." *State v. Rolfe, supra*, 444 P.2d at 433-434.)

ILLINOIS

Ill. Ann. Stat. c.38, §1005-3-1 (Smith-Hurd 1973) provides that "[a] defendant shall not be sentenced

before a written presentence report of investigation is presented to and considered by the court where the defendant is convicted of a felony." The contents of such a report are prescribed by Ill. Ann. Stat. c.38, §1005-3-2. In 1972, Illinois enacted Ill. Ann. Stat. c.38, §1005-3-4(b)(2) (Smith-Hurd 1973) which provides for mandatory, full disclosure of presentence reports and abandons the former Illinois rule that such disclosure was within the discretion of the trial court (*see People v. Forman*, 108 Ill. App.2d 482, 247 N.E.2d 917 (1969); *People v. Stroup*, 96 Ill. App.2d 315, 239 N.E.2d 1 (1968)). Presentence reports "shall be open for inspection . . . to the state's attorney and the defendant's attorney at least 3 days prior to the imposition of sentence."

INDIANA

Ind. Code. Ann. §35-8-1A-9 (1975) provides "[n]o defendant convicted of a felony shall be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court." Ind. Code Ann. §35-8-1A-10 (1975) prescribes the contents of the presentence report. Provisions for disclosure were added in 1973; the trial court must either give the defendant the presentence report itself or its "factual contents and conclusions":

> "[b]efore imposing sentence, the court shall:
> (1) advise the convicted person or his counsel and the prosecuting attorney of the factual contents and conclusions of the presentence investigation; or
> (2) provide the convicted person or his counsel and the prosecuting attorney with a copy of the presentence report.

> The sources of confidential information need not be disclosed. The court shall furnish the factual contents of the presentence investigation or a copy of the presentence report sufficiently in advance of sentencing so that the convicted person will be afforded a fair opportunity to controvert the materials contained therein."

Ind. Code Ann. §35-8-1A-13 (1975).

IOWA

In Iowa, upon any criminal conviction, "the court shall receive from the state and from the defendant any information which may be offered which is relevant to the question of sentencing"; and in felony cases, the trial court must also order a presentence investigation to be made. Iowa Code Ann. §789A.3 (1976 supp.). The contents of the presentence report are described in Iowa Code Ann. §789A.4 (1976 supp.). Disclosure of the presentence report is committed to the discretion of the trial court:

> "[t]he court may, in its discretion, make the presentence investigation report or parts of it available to the defendant, or the court may make the report of it available while concealing the identity of the person who provided confidential information. The report of any medical examination or psychiatric evaluation shall be made available to the attorney for the state and to the defendant upon request. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Iowa Code Ann. §789A.5 (1976 supp.). *See also State v. Waterman*, ____ Iowa ____, 217 N.W.2d 621, 624 (1974) ("In the present state of the law there is no

constitutional right to inspection of the presentence report. However, . . . it may be desirable, and in the future constitutionally necessary, to allow examination of the report.")

KANSAS

Kan. Stat. Ann. §21-4604 (1974) provides that a trial judge may order a presentence investigation and report "[w]henever a defendant is convicted of a crime or offense." In 1973, Kansas provided for full mandatory disclosure of presentence reports to defense counsel. Kan. Stat. Ann. §21-4605 (1974) now provides:

> "*Availability of report to defendant and others.* The judge shall make available the presentence report, any report that may be received from the diagnostic center, and other diagnostic reports to the attorney for the state and to the counsel for the defendant when requested by them, or either of them. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

KENTUCKY

In 1974, Kentucky made a presentence report mandatory for sentencing in all "conviction[s] of a felony, other than a capital offense." Ky. Rev. Stat. Ann. §532.050(1) (1975). The court must advise the defendant of the "factual contents and conclusions" of the report:

> "[b]efore imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Ky. Rev. Stat. Ann. §532.050(4) (1975). Ky. Rev. Stat. Ann., R. Crim. P. 11.02 (1972) further provides that "[b]efore imposing sentence the court shall afford the defendant and his counsel an opportunity to make a statement or statements in the defendant's behalf and, if the sentence is fixed by the court, to present any information in mitigation of punishment."

LOUISIANA

La. Code Crim. Proc., art. 875(A) (1976 supp.) authorizes (but does not require) a court, after a defendant is convicted "of an offense other than a capital offense", to order a presentence report from the Department of Corrections, Division of Probation and Parole. La. Code Crim. Proc., art. 877 (1967) provides:

> "[t]he pre-sentence or post-sentence investigation report shall be privileged and shall not be disclosed directly or indirectly to anyone other than the sentencing court, members of the division of probation and parole supervision, the officer in charge of the institution to which the defendant is committed, the parole board, the probation or the parole officer if the defendant is placed on probation or released on parole, medical authorities if the defendant is committed to a hospital, the pardon board, and the governor or his representative.

> Before imposing sentence the court may advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation report. The sources of confidential information shall not, however, be disclosed."

See State v. Hamilton, 312 So.2d 656 (La. 1975).

MAINE

A pre-sentence investigation report may be ordered at the discretion of the trial court, Me. Rev. Stat. Ann., R. Crim. P. 32(c)(1) (1975 spec. pamphlet). Rule 32(c)(2) provides:

> "*Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. If the defendant is represented by counsel, the court before imposing sentence shall permit counsel for the defendant to read the report of the pre-sentence investigation or to be present at the presentation of an oral report and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel, the court shall communicate, or have communicated to the defendant the essential facts in the report of the pre-sentence investigation and shall afford the defendant an opportunity to comment thereon. Confidential sources of information may be excluded from any report which counsel is permitted to read, which is presented in counsel's presence, or the essential facts of which are communicated to the defendant."

MARYLAND

In 1972, Maryland abandoned the rule that disclosure of presentence investigation reports was discretionary with the trial court (*see Costello v. State*, 237 Md. 464, 206 A.2d 812 (1965)) by enacting Md. Ann. Code art. 41, §124(b) (1975 cum. supp.):

> "[t]he presentence reports shall be made available, upon request, to the defendant's attorney and the State's attorney's office."

Defense counsel is now entitled to the presentence report "as of right." *Haynes v. State*, 19 Md. App. 428, 311 A.2d 822, 824-825 (1973).

MASSACHUSETTS

In Massachusetts, the disclosure of information in a probation report relating to prior convictions is mandatory, while disclosure of information relating to other facets of the defendant's character is discretionary (although the Supreme Judicial Court has stated that, under this discretion, disclosure should be liberally authorized). Mass. Gen. Laws. Ann. ch.276, §85 (1976 supp.) authorizes the probation officer to prepare a report on previous convictions of the defendant: "such record of the probation officer shall be made available to the defendant and his counsel for inspection." Mass. Gen. Laws Ann. ch.279, §4A (1976 supp.) contains a similar provision, authorizing a trial judge to receive such information (and mandating disclosure). However, probation officers are authorized to collect other information on criminal defendants by Mass. Gen. Laws Ann. ch.276, §100 (1976 supp.) (though the nature of

this information is not statutorily defined), and disclosure of this kind of information in a presentence report is discretionary with the court:

> "[b]ut in holding that disclosure under G.L. c.276, §100, is discretionary, we think that a word should be said concerning the exercise of such discretion . . . '[T]he authority granted the sentencing judge . . . to disclose material in the presentence investigation report and to give the defendant or his counsel an opportunity to comment on it should [not] be exercised conservatively and in a niggardly fashion. . . . [T]he administration of justice would be improved by a liberal and generous use of the power to disclose. The main consideration against full disclosure is the prospect that the revelation of certain material given the probation officer in confidence, would result in the destruction of the sources of such material and its availability—a consequence which would be highly prejudicial to the difficult task of imposing a proper sentence. But where the material in no wise relates to such a confidential declaration, there would appear to be little reason not to disclose what has been reported to the sentencing judge. This is a matter, however, which must rest in his sound discretion.' "

Commonwealth v. Martin, 355 Mass. 296, 244 N.E.2d 303, 307-308 (1969).

MICHIGAN

In Michigan, presentence reports are required in all felony cases. Mich. Comp. Laws Ann. §771.14 (1968). In 1973, the Michigan Supreme Court adopted a rule of general disclosure of presentence reports with certain limited exceptions. Michigan General Court Rule 785.12 (1975 spec. pamphlet) provides:

> "*Presentence Reports.* The sentencing court shall permit the defendant's attorney, or if he is not represented by counsel, the defendant to inspect the presentence report. The prosecution shall also be shown the report. Both parties shall be given an opportunity at time of sentencing to respond to the presentence report and to explain or controvert any factual representations disclosed. The court may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court shall state for the record the reasons for its action and inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure shall be subject to appellate review."

See also People v. McFarlin, 389 Mich. 557, 208 N.W.2d 504, 514 (1973).

MINNESOTA

In Minnesota, a presentence report may be ordered by the trial court in any case where a defendant has been convicted of a crime for which life imprisonment is not required. Minn. Stat. Ann., R. Crim. P. 27.02(1) (1976 spec. pamphlet). There is mandatory disclosure of the entire presentence report, except that "confidential sources of information" may but need not be disclosed. Rule 27.02(3) (1976 spec. pamphlet) provides:

> "[s]ubject to the limitations of Minn. Stat. §609.115, subd. 4, a copy of the presentence

> report, if written, shall be provided to counsel for all parties before sentence. Otherwise, the presentence report shall be subject to disclosure only as provided by law. If the presentence report is given orally, the defendant or his attorney shall be permitted to hear the report."

Minn. Stat. Ann. §609.115(4). (1964), in turn, provides:

> "[a]ny report made pursuant to subdivision 1 of this section shall be open to inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs."

The Rules also outline the manner in which the presentence report may be used at the sentencing hearing:

> "[s]ummary hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, each party shall notify the opposing party and the court of any part of a written presentence report which he intends to controvert by the production of evidence. Both the prosecutor and the defendant or his attorney shall have an opportunity to controvert any part of an oral presentence report and for such purpose the court may continue the sentencing."

Rule 27.03(1) (1976 spec. pamphlet). *See also State v. Tellock*, 273 Minn. 394, 142 N.W.2d 64 (1966).

MISSISSIPPI

The Mississippi Corrections Act of 1976, Miss. Gen. Acts. 1976, c. 440, p. 1 (adv. sheet no. 6), effective July 1, 1976, creates a Division of Community Services within the Department of Corrections, whose personnel are empowered to "investigate all cases referred to them for investigation . . . by any court in which they are authorized to serve." Chap. 440, §81 (enacting amended Miss. Code 1972 §47-7-9(2)(a)). Moreover,

> "[s]eparate division personnel (hereinafter presentence investigators) shall be provided to perform investigation for the court as provided in this subsection. Presentence investigators shall conduct presentence investigations on all persons convicted of a felony in any circuit court of the state, prior to sentencing and at the request of the circuit court judge of the court of conviction. The presentence evaluation report shall consist of a complete record of the offender's criminal history, educational level, employment history, psychological condition and such other information as the department or judge may deem necessary."

Chap. 440, §81 (enacting amended Miss. Code 1972 §47-7-9(3)(a)). The Corrections Act does not address the question of disclosure of presentence reports. The new Act transfers supervision of probationers from the Probation and Parole Board to the Department of Corrections (Chap. 440, §88 (enacting amended Miss. Code §47-7-33)) (*cf.* Miss. Code 1972 Ann. §47-7-33 (1973)), so it is unclear whether the confidentiality provisions of Miss. Code 1972 Ann. §47-7-21 (1973) which apply to employees of the Probation and Parole Board (§47-7-21 provides that all information gathered by Board employees is "privileged and shall not be disclosed directly or indirectly to any one other than to

the board, the judge or others entitled under this chapter to receive such information unless and until otherwise directed by such board or judge") continue to apply to the probation reports prepared by the Department.

MISSOURI

Missouri provides that presentence reports may be ordered at the discretion of the trial court (*see State v. Maloney*, 434 S.W.2d 487, 496 (Mo. 1968)) but the relevant Rule of Criminal Procedure is silent as to disclosure of the reports to the defense:

> "[w]hen a probation officer is available to any court having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Correction, such probation officer shall, unless otherwise directed by the court, make a presentence investigation and report to the court before the imposition of sentence or the granting of probation. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, his social history and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. The probation officer shall secure such other information as may be required by the court and, whenever it is practicable, such investigation shall include a physical and mental examination of the defendant."

Mo. R. Crim. P. 27.07(b) (1976 Mo. R. Ct. Pamphlet). There appear to be no precedents governing a defendant's right to disclosure, but it is clear that such disclosure has occurred in Missouri (*see, e.g., Griffith v. State*, 504 S.W.2d 323, 329 (Mo. App. 1974)) where the Missouri Court of Appeals noted that defense counsel had reviewed the presentence report).

MONTANA

Mont. Rev. Codes Ann. §95-2203 (1969) provides that a presentence investigation shall be conducted by a probation officer in all cases where a defendant is convicted of a crime which may result in a prison term of one year or more "unless the court deems such report unnecessary." Mont. Rev. Codes Ann. §95-2205 (1969) provides:

> "[t]he judge may, in his discretion, make the investigation report or parts of it available to the defendant or others, while concealing the identity of persons who provided confidential information. If the court discloses the identity of persons who provided information, the judge may, in his discretion, allow the defendant to cross-examine those who rendered information. Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Cf. Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347, 363-365 (1961).

NEBRASKA

Neb. Rev. Stat. §29-2261(5) (1975 repl.) provides:

> "[a]ny presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration."

In *State v. Richter*, 191 Neb. 34, 214 N.W.2d 16 (1974), the Nebraska Supreme Court held that it was error for the trial court to refuse disclosure of the portion of the presentence report dealing with prior arrests:

> "[t]he statutory provision codifies a rule of discretion in the trial court. . . . The District Court possesses a discretion, but no good reason comes to mind for denying defendant or his attorney access to that part of the report which notes any prior record of arrests and convictions. Should the court grant access to the report or part of it, the court at the request of defendant may hold an in camera hearing."

The defendant has a right to examine the presentence report *after* sentencing, however, and provision is made for including the report in the record on appeal:

> "[i]n all cases where a presentence report may be material on appeal, the defendant, his counsel, or counsel for the State may request the sentencing judge to forward it to the Clerk of the Supreme Court. In each instance, the sentencing judge shall forward it with the record to the Clerk in a separate sealed envelope. The defendant, his counsel, or counsel for the State may examine the report but it may not be removed from the office of the Clerk."

Neb. Rev. Stat., Neb. Sup. Ct. R. 7(h) (1974 spec. pamphlet).

NEVADA

In Nevada, the preparation of a presentence investigation report by the Probation Service of the district court is mandatory in every criminal case. Nev. Rev. Stat. §176.135 (1975).

> "1. The court shall disclose to the district attorney, to counsel for the defendant and to the defendant, the factual content of the report of the presentence investigation and the recommendations of the probation service and afford an opportunity to each party to comment thereon.
> 2. The sources of confidential information shall not be disclosed."

Nev. Rev. Stat. §176.156 (1975).

NEW HAMPSHIRE

In New Hampshire, a presentence investigation is mandatory before sentencing for a felony, unless it is waived by the defendant and the State. "The report shall include a recommendation as to disposition, together with reference to such material disclosed by

the investigation as supports such recommendation." N.H. Rev. Stat. Ann. §651:4(I) (1974 repl.). Disclosure of the "factual contents" of the presentence report is mandatory, and defendant must be afforded a fair opportunity to controvert them; the sources of confidential information "need not" be disclosed. N.H. Rev. Stat. Ann. §651:4(II) (1975 supp.) provides:

> "[b]efore imposing sentence, the court shall take such steps as may be necessary so that the defendant is advised, by his counsel, or otherwise, as the situation warrants, of the factual contents of any presentence investigation, and afforded a fair opportunity to controvert them. The sources of confidential information need not, however, be disclosed."

NEW JERSEY

In New Jersey, the trial judge must disclose to the defendant *all* "material having any bearing whatever on sentence" contained in the presentence report.

> "Before the imposition of a sentence or the granting of probation the probation service of the court shall make a presentence investigation and report to the court. The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant. If a custodial sentence is imposed, the probation service of the court shall, within 10 days thereafter, transmit a copy of the presentence report to the person in charge of the institution to which the defendant is committed."

N.J. Rev. Stat. Ann., R. Crim. Prac. 3:21-2 (1975). This Rule substantially broadens the disclosure requirements of *State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969) wherein the court permitted discretionary withholding of "confidential sources" and "diagnostic matters which would be harmful to the defendant's rehabilitation if he were told about them," 259 A.2d at 903-904.

NEW MEXICO

As of Sept. 1, 1975, New Mexico has moved to a rule of mandatory full disclosure of the "predisposition report." Prior to this date, N. Mex. Stat. Ann. §40A-29-15 (1972) authorized the trial court to order an investigative report after conviction of a defendant "of any crime not constituting a capital or first degree felony," and N. Mex. Stat. Ann. §41-17-23 (1972) defined the contents of the report but was silent as to disclosure. N. Mex. Stat. Ann. §41-23-56 (1975 supp.), enacting R. Crim. P. 56, effective Sept. 1, 1975, provides:

> "Rule 56—*Predisposition report procedure*
>
> (a) Ordering the Report. The court may order a predisposition report at any stage of the proceedings.
>
> (b) Inspection. The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than two [2] working days prior to any hearing at which a sentence may be imposed by the court.
>
> (c) Hearing. Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report."

NEW YORK

In 1975, New York enacted N.Y. Crim. Proc. L. §390.50 (1975-1976 supp.) providing mandatory disclosure of the presentence report, subject to certain exceptions:

> "*Confidentiality of pre-sentence reports and memoranda*
> 1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court.
> 2. Presentence report; disclosure; general principles. The presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memorandum. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review."

See People v. Perry, 36 N.Y.2d 114, 365 N.Y.S.2d 518, 324 N.E.2d 875 (1975). Prior to 1975, disclosure of the report had been left to the discretion of the trial court. *See, e.g., People v. Peace*, 18 N.Y.2d 230, 273 N.Y.S.2d 64, 219 N.E.2d 419 (1966).

NORTH CAROLINA

In 1967, North Carolina moved to a rule of full mandatory disclosure of presentence diagnostic reports. *See* N.C. Laws 1967, c. 996, §2. N.C. Gen. Stat. §148-12(b) (1974 repl.) now provides:

> "[a] copy of the diagnostic study report shall be made available to defense counsel before the court pronounces sentence. The defendant shall be afforded fair opportunity to controvert the contents of the report, if he so requests."

Previously, the rule in North Carolina has been that the trial court had discretion to disclose or not disclose presentence reports. *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126, 133 (1962).

NORTH DAKOTA

N.D. Cent. Code, R. Crim. P. 32(c)(1) (1974) provides that the trial court may order a presentence investigation at its discretion. Rule 32(c)(3) provides that the report of this investigation "shall" be disclosed unless it contains "information which if disclosed would be harmful to the defendant or other persons; in such case, the trial judge "shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence":

"*Disclosure.*
(i) Before imposing sentence the court shall permit the defendant, and his counsel if he is so represented, to read the report of the presentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.
(ii) If the court is of the view that there is information in the presentence report, disclosure of which would be harmful to the defendant or to other persons, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.
(iii) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.
(iv) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney."

See also N.D. Cent. Code §12-59-04 (1976 repl.).

OHIO

The rule of *State v. Vance*, 117 Ohio App. 169, 191 N.E.2d 737 (1962), providing for mandatory disclosure of presentence reports, governs capital cases, while Ohio Rev. Code Ann., tit. 29, R. Crim. P. 32.2(A) (1975)

governs non-capital cases and authorizes disclosure at the discretion of the court. Rule 32.2(A) provides:

"(1) Except in cases of aggravated murder committed on and after January 1, 1974, the report of the presentence investigation shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.
(2) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.
(3) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court, probation officer or investigator immediately following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney."

OKLAHOMA

In 1975, Oklahoma moved to a rule of mandatory disclosure of "the factual contents and the conclusions of any presentence investigation."

"*Presentence investigation*
Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make

a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion the court or the Division, it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing."

Okla. Stat. Ann. tit. 22, §982 (1975-1976 supp.). Previously, the statute was silent as to disclosure. *See* Okla. Stat. Ann. tit. 57, §519 (1969).

OREGON

In 1973, Oregon provided for mandatory disclosure of the presentence report, with certain exceptions. Ore. Rev. Stat. §137.079 (1975) now provides:

"*Presentence report; disclosure to parties; court's authority to except parts from disclosure.* (1) A copy of the presentence report shall be made available to the district attorney, the defendant or his counsel a reasonable time before the sentencing of the defendant.

(2) The court may except from disclosure parts of the presentence report which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were obtainable only on a promise of confidentiality.

(3) If parts of the presentence report are not disclosed under subsection (2) of this section, the court shall inform the parties that information has not been disclosed and shall state for the record the reasons for the court's action. The action of the court in excepting information shall be reviewable on appeal."

See also Ore. Rev. Stat. 137.077 (1975). Previously, the rule in Oregon had been that the trial judge had discretion to disclose or not disclose the presentence report. *See* Ore. Rev. Stat. §137.090 (1971); *Buchea v. Sullivan*, 262 Ore. 222, 497 P.2d 1169 (1972).

PENNSYLVANIA

In 1973, by judicial decision, *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), and by promulgation of a rule of criminal procedure, Pa. Stat. Ann., R. Crim. P. 1404 (1976 spec. pamphlet), Pennsylvania moved to a rule of mandatory inspection of the presentence report, subject only to the trial court's power to "impose conditions of confidentiality." Rule 1404 provides:

"(a) All psychiatric and pre-sentence reports shall be confidential records. They shall be available only to:

(1) the sentencing judge;

(2) the attorney for the Commonwealth and counsel for the defendant, for inspection only, on conditions stated by the sentencing judge, provided that counsel shall not be supplied with copies of such reports unless ordered by the sentencing judge, but counsel shall be given the opportunity to comment thereon before the imposition of sentence;

(3) on the order of the sentencing judge, persons or agencies having a legitimate professional interest in the disposition of the instant case, including:

(i) a physician or psychiatrist appointed to assist the court in sentencing;

(ii) an examining faculty;

(iii) a correctional institution;

(iv) a department of probation or parole.

(b) The sentencing judge may impose conditions of confidentiality consistent with this Rule."

See also Commonwealth v. Burton, 451 Pa. 12, 301 A.2d 675, 677 (1973).

RHODE ISLAND

In Rhode Island, a presentence report must be made in every case in which a sentence of imprisonment for more than one year may be imposed except where the prescribed punishment is death or life imprisonment. Super. Ct. R. Crim. P. 32(c)(1) (1972 spec. pamphlet). *See also* R.I. Gen. Laws Ann. §12-19-6 (1974 supp.).

Under Super. Ct. R. Crim. P. 32(c)(2) (1972 spec. pamphlet), the trial court "may" disclose "all or part" of the presentence report to defendant:

"[t]he report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing or deferring sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. A copy of the report shall be furnished to the Attorney General to aid him in making a recommendation to the court concerning the sentence to be imposed. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon."

This Rule was adopted in 1972. The Official Comment to the Rule states that:

"Although this provision does not require the Court to furnish the defendant or his counsel with the report, the court is authorized to make all or any part of it available. To assure the accuracy of the information relied upon in sentencing, the court may, whenever feasible, make the report available to defendant or his counsel. See *State v. Kunz*, 55 N.J. 129 (1969) (holding that as a matter of "rudimentary fairness" defendants in New Jersey are entitled to disclosure of presentence reports, with appropriate excisions to protect confidential sources or matters harmful to the defendant's rehabilitation and to an opportunity to comment on prejudicial material contained therein prior to sentencing). See also ABA, Standards Relating to Sentencing Alternatives and Procedures, pp. 213-225 (approved draft 1968)."

SOUTH CAROLINA

No statutes or rules authorize presentence investigations. South Carolina law is clear that all evidence upon which a sentence is based be presented in open court to insure the defendant's right of confrontation and cross-examination. "Where the liberty of a defendant is concerned and he is to be sentenced by the judge, he has a right that everything appertaining to the case, in the way of evidence affecting the case, be open and above board and public." *State v. Harvey*, 128 S.C. 447, 123 S.E. 201, 203 (1924) (case remanded for resentencing where trial court had discussed sentencing of defendant *in camera* with solicitor alone). *Accord: State v. Simms*, 131 S.C. 420, 127 S.E. 840 (1925) (case remanded for resentencing where trial court pronounced sentence based upon what citizens had told him in chambers about the defendant); *State v. Bodie*, 213 S.C. 325, 49 S.E.2d 575, 577 (1948) (trial court properly disavowed reliance on hearsay statements before he sentenced defendant). *See also State v. Brandon*, 210 S.C. 495, 43 S.E.2d 449, 453-454 (1947) (on petition for rehearing).

SOUTH DAKOTA

The statute authorizing the preparation of a presentence report, S.D. Comp. Laws Ann. §23-48-18 (1967) provides:

> "[s]uch report shall be privileged and confidential except for the use thereof by the court and the board [of pardons and parole] in the disposition of the case in which made. It shall not thereafter be used against the defendant in any other action.

> If filed in the case such report shall be enclosed in a sealed envelope with a notation thereof that it shall not be opened except by order of the court."

In *State v. Robinson*, ____ S. Dak. ____ 209 N.W.2d 374 (1974), the South Dakota Supreme Court ruled that a trial court had discretion to disclose the report to the defense, and could allow the defendant to refute it by submitting information, 209 N.W.2d at 378. In *State v. Hanson*, ____ S. Dak. ____, 215 N.W.2d 130 (1974), the Court held that nondisclosure of a presentence report because of confidential sources in it was within the discretion of the trial court. The Court encouraged judges to be liberal in making disclosure, however:

> "[a]s an officer of the court the defense attorney is capable of observing the confidentiality required and this disclosure would foreclose the possibility of any inaccuracy of a serious nature in the report."

215 N.W.2d at 134.

TENNESSEE

Preparation of a report by a probation officer is required before a defendant may be placed on probation:

> "*Investigation and report by probation and paroles officer—Supervision of parolee.*—The power of suspension and probation is within the sole discretion of the trial judge; however, when a probation and paroles officer is available to the court, no defendant shall be placed on probation until a written report of investigation by a probation and paroles officer shall have been presented to and

considered by the court, provided the probation and paroles officer to whom such matter has been referred shall file his report within ten (10) days after such reference. Said report shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Whenever the trial judge deems it desirable, such investigation shall include a physical and mental examination of the defendant, the expense of which shall be adjudged as part of the costs. All persons released on probation shall be subject to the direct supervision of the board of pardons and paroles, and each such probationer must report as directed to his probation and paroles officer until released from supervision. No probationer shall be allowed to leave the jurisdiction of his probation and paroles officer without the express permission of the trial judge."

Tenn. Code Ann. §40-2904 (1975 repl.). Such a report is occasionally referred to as a "pre-sentence investigation." *Stiller v. State*, ____ Tenn. ____, 516 S.W.2d 617, 618 (1974). There are no provisions in the Tennessee Code governing disclosure of the report, and there are apparently no cases which directly address this question. However, the practice in Tennessee seems to be that defense counsel receive copies of the probation report: *see, e.g., Stiller v. State, supra*, 516 S.W.2d at 622, where the Tennessee Supreme Court disapproved the practice of defense counsel's attaching a copy of the report to his brief.

TEXAS

Vern. Tex. C. Crim. P. Ann., art. 42.12, §4 (1966) provides:

"[w]hen directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. If a defendant is committed to an institution, the probation officer shall send a report of such investigation to the institution at the time of commitment."

Disclosure of the presentence report is in the discretion of the trial court. *See Rodriguez v. State*, 502 S.W.2d 13, 14-15 (Tex. Cr. App. 1973).

UTAH

Utah's 1973 statute authorizing presentence "studies" conducted by the Division of Corrections contains a mandatory disclosure provision. Utah Code Ann. §76-3-404 (1975 supp.) provides:

"*Pre-sentence investigation—Commitment of defendant—Sentencing procedure.*—(1) In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the pre-sentence report, the court may, in its discretion, commit a convicted defendant to the custody of the division of corrections for a period not exceeding ninety days. The division of corrections shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be

available to suit his needs. By the expiration of the period of commitment, or by the expiration of the additional time as the court shall grant, not exceeding a further period of ninety days, the defendant shall be returned to the court for sentencing, and the court, prosecutor, and the defendant or his attorney shall be provided with a written report of results of the study, including whatever recommendations the division of corrections believes will be helpful to a proper resolution of the case. After receiving the report and recommendations, the court shall proceed to sentence a defendant in accordance with the sentencing alternatives provided under section 76-3-201."

The "presentence report" prepared by probation officers appears to be disclosable at the discretion of the trial court. *See State v. Doremus*, 29 Utah2d 373, 510 P.2d 529 (1973); *State v. Dowell*, 30 Utah2d 323, 517 P.2d 1016 (1974).

VERMONT

A trial court has discretion to disclose the presentence report to the defendant "whenever the best interest or welfare of the defendant . . . makes that action desirable or helpful":

"[a]ny presentence report, pre-parole report, or supervision history prepared by any employee of the department in the discharge of his official duty, is privileged and shall not be disclosed to anyone outside the department other than the judge or the parole board, except that the court or board may in its discretion permit the inspection of the report or parts thereof by the state's attorney, the defendant or inmate or his attorney,

or other persons having a proper interest therein, whenever the best interest or welfare of the defendant or inmate makes that action desirable or helpful."

Vt. Stat. Ann. tit. 28 §204(d) (1975 cum. supp.). *See also State v. Morse*, 126 Vt. 314, 229 A.2d 232 (1967); *In re Shuttle*, 131 Vt. 457, 306 A.2d 667 (1973).

VIRGINIA

The Virginia rule is mandatory disclosure of the full presentence report. A defendant is entitled to receive the report five days before it is presented by the probation officer in open court subject to cross-examination.

"*Investigations by probation officers in certain cases.*—When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case."

Va. Code §19.2-299 (1975 repl.). Failure to afford defendant the right to cross-examine and present evidence is reversible error. *Linton v. Commonwealth*, 192 Va. 437, 65 S.E.2d 534 (1951).

WASHINGTON

With the promulgation of its superior court rules in 1973, Washington adopted a rule of mandatory disclosure except where revelation of information in the presentence report "would be harmful to the defendant or to other persons." Wash. Super. Ct. R. Crim. P. 7.2(c) (1975 spec. pamphlet) provides:

> "(1) Before imposing sentence, the court shall permit the defendant to read the report of the presentence investigation unless in the opinion of the court the report contains information which if disclosed would be harmful to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity for comment or rebuttal.
>
> (2) If the court is of the view that there is information in the presentence report, disclosure of which would be harmful to the defendant or to other persons, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity for comment or rebuttal. The statement may be made to the parties *in camera*."

WEST VIRGINIA

W. Va. Code Ann. §62-12-7 (1966) provides for the preparation of probation reports in the case of "any prospective probationer":

> "[w]hen directed by the court, the probation officer shall make a careful investigation of, and a written report with recommendations concerning, any prospective probationer. Insofar as practicable this report shall include information concerning the offender's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationship, ages and condition of those dependent upon him for support, and such other facts as may aid the court in determining the propriety and conditions of his release on probation. No person convicted of felony shall be released on probation until this report shall have been presented to and considered by the court. The court may in its discretion request such a report concerning any person convicted of a misdemeanor. A copy of all reports shall be filed with the board of probation and parole."

There do not appear to be any statutes, rules, or decisions governing the question of disclosure of such reports. A 1967 study found that in half of West Virginia's courts, such reports were routinely disclosed to defense counsel; in the remainder, such reports were "rarely" or "never" disclosed. Lowensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 63 W.VA. L. REV. 159, 161-163 (1967).

WISCONSIN

Presentence reports must be disclosed to a defendant, except that the identity of persons providing informa-

tion for the report may be concealed. Wis. Stat. Ann. §972.15 (1971) provides:

> "(1) After conviction the court may order a presentence investigation.
>
> (2) When a presentence investigation report has been received, the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.
>
> (3) The judge may conceal the identity of any person who provided information in the presentence investigation report.
>
> (4) After sentencing, unless otherwise ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court."

WYOMING

In Wyoming, the probation service of the court "shall make a presentence investigation and report to the court before the imposition of sentence . . . unless the court otherwise directs." Wyo. Stat. Ann., R. Crim. P. 33(c)(1) (1975 supp.). Rule 33(c)(2) provides:

> "[t]he court, before imposing sentence, shall disclose to the defendant or his counsel all of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. The material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the State."

APPENDIX B: DISCLOSURE OF PRESENTENCE REPORTS IN THE FEDERAL COURTS

In federal criminal prosecutions, disclosure of presentence reports is governed by Rule 32(c) of the Federal Rules of Criminal Procedure. Prior to its most recent amendment in 1975, Rule 32(c) provided only that the trial court "may" disclose all or part of the presentence report.[1b] However, in the framework of

[1b]The draft of Rule 32 submitted by the Advisory Committee to the Supreme Court in 1940 contained a provision that the presentence report should be made available to the attorneys for the parties and such other persons as the court might designate. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §524 (1969). This provision was deleted from the rules as adopted by the Court in 1946, and thus the original Rule 32 made no reference to the question of disclosure. There are few reported cases on disclosure prior to the 1966 amendment of the Rule, and the issue was apparently treated as a matter of discretion for the trial court. *Compare Smith v. United States*, 223 F.2d 750, 757 (CA 1955), *rev'd on other grounds*, 360 U.S. 1 (1958); *Stephan v. United States*, 133 F.2d 87, 100 (CA6 1943); *with United States v. Durham*, 181 F.Supp. 503, 503-504 (D.D.C. 1960).

Rule 32(c) was amended in 1966 to provide in subsection (2) that "[t]he court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon." Since it was generally assumed that courts already had this power, the amendment made no change in federal law. But the Advisory Committee noted in its commentary that, by spelling out this discretionary power, "[i]t [was] . . . hoped that courts [would] . . . make increasing use of their discretion to disclose so that defendants generally [would] . . . be given full opportunity to rebut or explain facts in presentence reports which [are] . . . material factors in determining sentences." 1966 Advisory Committee Note to Proposed Rule 32(c)(2), Federal Rules of Criminal Procedure, 39 F.R.D. 193, 194 (1966).

this apparently neutral language, the federal circuits were remarkably uniform in declaring that disclosure was the preferred practice.[2b] Moreover, the Courts of Appeals fashioned several rules that effectively restricted the procedures or the circumstances under which a denial of disclosure would be sustained as a proper exercise of discretion.[3b]

[2b]*See Morano v. United States*, 374 F.2d 583, 585-586 (CA1 1967); *United States v. Fischer*, 381 F.2d 509, 512 (CA2 1967); *United States v. Holder*, 412 F.2d 212, 215 (CA2 1969); *United States v. Virga*, 426 F.2d 1320, 1323 (CA2 1970) (*en banc*); *United States v. Brown*, 470 F.2d 285, 288 (CA2 1972); *United States v. Knupp*, 448 F.2d 412, 413 (CA4 1971); *United States v. Powell*, 487 F.2d 325, 329 (CA4 1973); *United States v. Johnson*, 495 F.2d 377, 378 (CA4 1974); *Smith v. United States*, 223 F.2d 750, 754 (CA5 1955), *rev'd on other grounds*, 360 U.S. 1 (1958); *United States v. Espinoza*, 481 F.2d 553, 557-558 (CA5 1973); *Stephan v. United States*, 133 F.2d 87, 100 (CA6 1943); *United States v. Calvert*, 523 F.2d 895, 913 (CA8 1975); *United States v. Bryant*, 442 F.2d 775, 778 (CADC 1971). *Cf. United States v. Solomon*, 422 F.2d 1110, 1120 (CA7 1970).

[3b]*See United States v. Picard*, 464 F.2d 215, 220 (CA1 1972) (to the extent the presentence report is relied upon in determining sentence, it must be made known to the defendant); *United States v. Janiec*, 464 F.2d 126, 127 (CA3 1972) (list of prior convictions must be disclosed to defendant or counsel if relied upon in any way); *Baker v. United States*, 388 F.2d 931, 933 (CA4 1968) (at a minimum, defendant must be apprised of convictions and charges of crime attributed to him in the presentence report); *United States v. Miller*, 495 F.2d 362, 364-365 (CA7 1974) (any grounds in the presentence report motivating sentence must be stated); *United States v. Isaac*, 442 F.2d 119, 120 (CADC 1970) (district court must state in writing the particular reason for a finding that specific portions of the presentence report should remain confidential; sealed copy of presentence report and of any undisclosed statement regarding the reasons for non-disclosure are to be transmitted to the court of appeals. *United States v. Bryant*, 442 F.2d 775, 778 (CADC 1971) (fact that discretion was exercised on an individual basis must appear on the face of the record).

(continued)

The movement from discretionary to mandatory disclosure of the presentence report was codified in the 1975 amendment to Rule 32(c).[4b] Disclosure of the

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(footnote continued from preceding page)

Although numerous decisions during the pre-1975 period did uphold denials of disclosure as within the sentencing court's exercise of discretion under Rule 32(c), *see, e.g., United States v. Alexander*, 498 F.2d 934 (CA2 1974); *United States v. Weiner*, 376 F.2d 42 (CA3 1967); *United States v. McKinney*, 450 F.2d 943 (CA4 1971); *United States v. Frontero*, 452 F.2d 406 (CA5 1971); *United States v. Jones*, 490 F.2d 207 (CA6 1974); *United States v. Dace*, 502 F.2d 897 (CA8 1974); *Fernandez v. Meier*, 432 F.2d 426 (CA9 1970); *Johnson v. United States*, 485 F.2d 240 (CA10 1973); *United States v. Delaney*, 442 F.2d 120 (CADC 1971), the only cases during this period to hold that the presentence report should never be disclosed are *United States v. Conway*, 296 F.Supp. 1284 (D.D.C. 1969) (although district judge stated that his policy was "to discuss significant aspects of a presentence report with defense counsel informally," *id.* at 1285), and *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960) (presentence reports are confidential documents). The District of Columbia Circuit repudiated this position in *United States v. Queen*, 435 F.2d 66, 67 (CADC 1970) and *United States v. Bryant*, 442 F.2d 775, 777 (CADC 1971). *See also United States v. Brown*, 470 F.2d 285, 287-288 (CA2 1972).

[4b]The 1975 amendment, effective December 1, 1975, provides in subsection (3)(A):

> "Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, of any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

presentence report is now obligatory subject to the power of the sentencing court to withhold portions that could seriously interfere with rehabilitation of the defendant, compromise confidentiality of sources, or create a risk of harm to the defendant or others.[5b] Rule 32(c) further provides that if the court elects not to disclose some portion of the report in reliance on one

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[5b]The Advisory Committee underscored its reasons for recommending that a mandatory disclosure procedure be adopted.

> "The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing."

8A J. MOORE, MOORE'S FEDERAL PRACTICE–CRIMINAL RULES ¶32.01[5] (1975), at 32-13.

The report of the House Judiciary Committee similarly emphasized the importance of such a mandatory disclosure procedure.

> "The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report." *(continued)*

of these limited exceptions, it must summarize the factual information contained in the undisclosed portion and must give the defendant or his counsel an opportunity to comment thereon.[6b]

(footnote continued from preceding page)

House Report No. 94-247, Federal Rules of Criminal Procedure Amendments Act of 1975 (House Judiciary Committee, 94th Cong., 1st Sess.) (1975) (2 U.S. CODE CONG. & ADMIN. NEWS 674, 690 (94th Cong., 1st Sess., 1975)).

[6b]Subsection (B) of Rule 32(c)(3) provides:

> "If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera."